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# U.S. FEDERAL COMMUNICATIONS COMMISSION REPORTS
## (103 F.C.C. 2d)

**Decisions, Reports, Public Notices, and Other Documents of the Federal Communications Commission of the United States**

## VOLUME 103 (2d Series)
## Pages 1 to 525

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# SUBJECT DIGEST

Alien Ownership

In a *Declaratory Ruling*, the Commission specified that limited partnership interests are ownership interests within the scope of the citizenship requirements embodied in Section 310(b)(3) and (4) of the Communications Act. In addition, the Commission clarified the manner in which it would apply the statutory benchmarks contained in Section 310(b)(3) and (4).
*— Wilner & Scheiner*

Anticompetitive Practice

Newspaper's first-place listing of programs of its commonly owned TV station held not to constitute a cross-ownership abuse where other stations otherwise treated equally; egregious cases may still warrant review.
*— WDAY, Inc.*

Application, Amendment of, Right to File

Order on Reconsideration adopted regarding the return of Round IV Cellular applications for failure to demonstrate availability of sufficient net liquid assets to satisfy estimated system costs referred to Commission in order to reach a final decision on acceptability for filing with a minimum of delay. Pre-lottery amendments to correct defects not allowed. Reconsideration denied concerning 211 applications which were properly returned for failure to satisfy the Commission's established and properly noticed requirements for demonstrating that specific types of assets qualify as liquid. Reconsideration granted for four applications because of staff errors in failing to credit certain assets that met the net liquid assets requirements and in failing to analyze multiple market total costs in accordance with applications actually filed.
*— American Cellular Corp.*

Order on Reconsideration adopted regarding the return of Round IV cellular applications for failure to include required documents or data referred to Commission in order to reach a final decision on acceptability for filing with a minimum of delay. Amendments to submit omitted materials were not allowed. Eight applications were reinstated because the material omitted from the original of the application was actually on file either in other copies of the same application or in other Round IV applications filed by the applicant.
*— American Cellular Enterprises*

Order on Reconsideration adopted regarding the return of Round IV cellular applications for failure to demonstrate a reasonable assurance of the availability of proposed debt or equity financing referred to Commission in order to reach a final decision on acceptability for filing with a minimum of delay. At total of 151 applications were determined to have been properly returned because they failed to tender bank commitment letters which include essential terms or

provide guarantees for funding sufficient to cover the total estimated costs. Three petitions were granted to correct staff errors.
*— Amer. Lo-Power TV Netwk., Inc.*

Order on Reconsideration adopted regarding the return of Round IV cellular applications which had been returned for impermissible CGSA extensions or unexplained 39 dBu contour extensions into central MSAs referred to Commission in order to reach final decision on acceptability for filing with a minimum of delay. Pre-lottery amendments to correct defects not allowed. Reconsideration denied concerning six applications which were properly returned for failure to satisfy properly noticed Commission requirements. Reconsideration granted for one application because the CGSA extension indicated on the map submitted with the original of the application was demonstrated to be a mistake.
*— Bell Atlantic Mobile System*

Order on Reconsideration adopted regarding the return of Round IV cellular applications for having defective maps referred to Commission in order to reach a final decision on acceptability for filing with a minimum of delay. Reconsideration denied concerning seven applications which were properly returned for failure to submit a map of the required scale and for failure to clearly indicate latitude and longitude in compliance with the properly noticed map requirements of Section 22.903.
*— Celcom, Inc.*

Order on Reconsideration adopted regarding the return of Round IV Cellular applications for miscellaneous defects referred to Commission in order to reach a final decision on acceptability for filing with a minimum of delay. Pre-lottery amendments to correct defects not allowed. Reconsideration denied concerning: 1) three applications which failed to comply with the 75 percent minimum 39 dBu contour coverage requirement of Section 22.903(a); and 2) one application which violated the multiple application ownership prohibition of Section 22.921. Reconsideration granted for: 1) five applications because of a misinterpretation of a pre-filing agreement; and 2) one application because the application defects did not not appear in the copy of the application on file in the Commission's Cellular Public Reference Room.
*— MV Cellular, Inc.*

Order on Reconsideration adopted regarding the return of Round IV cellular applications for failure to independently demonstrate the financial qualifications of the applicants referred to Commission in order to reach a final decision on acceptability for filing with a minimum of delay. Pre-lottery amendments to correct defects not allowed. Reconsideration denied concerning 49 of the applications containing bank letters which made a financial commitment to the "merged entity" resulting from effectuation of a pre-filing agreement. Reconsideration granted for one application because bank letter did evidence independent demonstration of applicant's qualifications. Reconsideration granted for 18 other applications containing bank letters addressed to "Dear Applicant" that were found to

include all essential terms, and to satisfy the independent demonstration requirement.
— *Vineyard Cellular Communications*

Application, Not Acceptable for Filing

Order on Reconsideration adopted regarding the return of Round IV cellular applications for failure to include site availability certifications in their applications referred to Commission in order to reach a final decision on acceptability for filing with a minimum of delay. Reconsideration granted for all 12 applications because the applicants presented documentation satisfying the Commission's requirements for granting reconsideration.
— *American Cellular Corp.*

(See: Application, Amendment of, Right to File — *American Cellular Corp.*)

(See also: Application, Amendment of, Right to File — *American Cellular Enterprises*)

(See also: Application, Amendment of, Right to File — *Amer. Lo-Power TV Netwk., Inc.*)

(See also: Application, Amendment of, Right to File — *Bell Atlantic Mobile Systems*)

(See also: Application, Amendment of, Right to File — *Celcom, Inc.*)

Order on Reconsideration adopted regarding return of Round IV cellular applications for failure to disclose the other involved applicants in a pre-filing agreement or the nature of the interest in the surviving application referred to Commission in order to reach a final decision on acceptability for filing with a minimum of delay. Reconsideration granted for all applications because they satisfied the Commission's requirement to disclose the existence of any pre-filing agreements.
— *Artcell*

(See also: Application, Amendment of, Right to File — *MV Cellular, Inc.*)

Application for Review of return of cellular application as unacceptable for filing granted. Application which complied with 39 dBu contour minimum coverage requirement of Section 22.903(a) reinstated.
— *Peoria MSA Limited Partnership*

(See also: Application, Amendment of, Right to File — *Vineyard Cellular Communications*)

CATV Program Exclusivity, Network Programming

Following remand from Court of Appeals, granted request for waiver of significantly viewed exemption to network program nonduplication rules. Local station demonstrated by use of audience viewing data that distant station has not met significant viewing standards for five years.
— *KCST-TV, Inc.*

CATV Special Relief
(See: CATV Program Exclusivity, Network Programming — *KCST-TV, Inc.*)

Cellular Communications Systems
Initial Decision granting nonwireline cellular application to Automatic Wide-Area Cellular Systems, Inc. (AWACS) affirmed with modifications. Commission found AWACS entitled to moderate preferences for its assessment of relative demand for service and for its ability to accommodate local demand, and to a slight preference for its expansion plan. These outweighed slight preferences awarded to Cellular Mobile Systems of Pennsylvania (CMS) for coverage of geographic area and population and for its proposed rate structure and slight preferences awarded to MCI Cellular Telephone Company (MCI) for its assessment of relative demand and for its proposed service offerings. Commission also affirmed the Common Carrier Bureau's denial of a proposed partial settlement between CMS and MCI and disposed of other procedural matter.
*— Celcom Communications Corp.*
CC Docket No. 83-25

Character Qualifications, Effect of Misrepresentation
Review Board affirms ALJ's conclusion that applicant is not qualified to be a Commission licensee. An active principle in the applicant was guilty of misrepresentations to the Commission in another proceeding. There he represented to the Commission that he had ceased to be a principal of an applicant, but continued to be actively involved in its affairs.
*— Bellingham TV Assn., Ltd.*
MM Docket No. 83-993

Circumstances, Change in, Substantial or Significant
(See: Application, Amendment of, Right to File — *American Cellular Corp.*)

Citizenship Requirement
(See: Alien Ownership — *Wilner & Scheiner*)

Common Carrier, Operating Expenses
Commission prescribed updated depreciation rates and amortizations for two domestic telephone companies. The rates so prescribed are for the classes of plant shown in the Appendix to the Order and are based upon the Straight Line Equal Life Group (SLELG), and Straight Line Remaining Life (SLRL) methodologies.
*— Continental of Virginia*

Commission prescribed depreciation rates and amortizations for fourteen domestic telephone companies consisting of Citizens Utilities of California, and eight Bell, three GTE, and two Continental affiliates. The rates so prescribed are for the classes of plant shown in the Appendix to the Order and are based upon the Straight Line Equal Life Group (SLELG), and Straight Line Remaining Life (SLRL) methodologies.
*— Bell of Pennsylvania*

Common Carrier, Investigation by FCC

Private line tariff restructuring proposed by American Telephone & Telegraph Co. (Tariff Nos. 9, 10, and 11) permitted to take effect. Revisions generally improve consistency and clarity of carrier's private line offerings; subsequent investigation order to address remaining issues.
— *AT&T Communications*

Common Carrier, Private Communications Services

(See: Common Carrier, Investigation by FCC — *AT&T Communications*)

Common Carrier, Rate or Tariff, Unlawful

Order found AT&T Communications' tariff revisions, proposing to implement an optional calling plan called PRO America, to be noncompensatory and, therefore, unlawful.
— *AT&T Communications*
CC Docket No. 85-128

Common Carrier, Tariffs, Software Defined Networks, Virtual Private

Commission Order adopted terminating investigation of AT&T and Northwestern Bell tariffs for software defined network services and permitting tariffs to take effect.
— *AT&T Communications*
CC Docket No. 85-203

Comparative Coverage Issue

FCC overturns previous ruling allowing the licensing of a broadcast station which had been completely built prior to obtaining a construction permit. Applicant's construction activities here did not violate Section 319(a) of the Communications Act. Winner receives moderate-to-substantial signal coverage perference.
— *Christian B/cing of Midlands, Inc.*
BC Docket No. 81-178

Comparative Criteria

Applicant with local residence credit prevails over one with broadcast experience advantage. Female credit not assigned because not decisional in the circumstances and because of confusion as to whether Commission still supports this credit.
— *Talleyrand Broadcasting*
MM Docket No. 84-98

(See: Cellular Communications Systems — *Celcom Communications Corp.*)

Comparative Hearing

Review Board denied reconsideration of *Memorandum Opinion and Order*. FCC 85R-90, released November 7, 1985, which remanded proceeding on transmitter site availability issue. Requests for reconsideration of interlocutory orders, or to rehash matters addressed and resolved, are impermissible. Clarification or addition of issues requires filing proper motion with ALJ.
— *Alden Communications Corp.*

MM Docket No. 83-720

(See also: Cellular Communications System — *Celcom Communications Corp.*)

**Comparative Issue**

**Substantial demerit assigned under diversification where applicant owned AM station in proposed community of license. Presence of other media in community does not make preference insubstantial. Integration challenge also rejected as unsupported by record.**

— *Hugh M. McBeath*

MM Docket No. 83-1193

**Cross Interest**

(See: Anticompetitive Practice — *WDAY, Inc.*)

**Depreciation Rate**

(See: Common Carrier, Operating Expenses — *Bell of Pennsylvania*)

(See also: Common Carrier, Operating Expenses — *Continental of Virginia*)

**Disqualification, Character**

(See: Character Qualifications, Effect of Misrepresentation — *Bellingham TV Assn., Ltd.*)

**Domestic Public Cellular Telecommunications Service**

(See: Cellular Communications Systems — *Celcom Communications Corp.*)

**FCC Jurisdiction**

**Telephone company's charges for intracity OPX lines used to carry both inter-and intrastate communications are subject to FCC rate jurisdiction, even if the service is deemed "telephone exchange service" for purposes of 221(b).**

— *AT&T*

**Financial Qualifications, Availability of Funds**

(See: Application, Amendment of, Right to File — *Amer. Low-Power TV Netwk., Inc.*)

(See also: Application, Amendment of, Right to File — *American Cellular Corp.*)

(See also: Application, Amendment of, Right to File — *Vineyard Cellular Communications*)

**Interlocutory Ruling, Petition for Reconsideration of, Denied or Dismissed**

(See: Comparative Hearing — *Alden Communications Corp.*)

**Intrastate Facilities**

(See: FCC Jurisdiction — *AT&T*)

Issue, Clarification or Enlargement of, Need for Motion for
(See: Comparative Hearing — *Alden Communications Corp.*)

Line Services, Unreasonable Discrimination, Bypass
(See: Common Carrier, Tariffs, Software Defined Networks, Virtual Private — *AT&T Communications*)

Message Telecommunications Service
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Misrepresentation
Review Board affirms ALJ's grant of CP in comparative contest for new FM station. Losing applicant was assessed decisive demerits for specifying antenna site without first seeking approval from site owners and for misstating its conversations with site owner. Demerits were tantamount to disqualification because applicant could be licensed only if competing applicant failed.
—*Professional Radio, Inc.*
MM Docket No. 84-63

(See: Character Qualifications, Effect of Misrepresentation — *Bellingham TV Assn., Ltd.*)

Misstatement
(See: Misrepresentation — *Professional Radio, Inc.*)

Mobile Radio Service, Cellular
(See: Application, Amendment of, Right to File — *Amer. Lo-Power TV Netwk., Inc.*)

(See also: Application, Amendment of, Right to File — *American Cellular Corp.*)

(See also: Application, Amendment of, Right to File — *American Cellular Enterprises*)

(See also: Application, Amendment of, Right to File — *Bell Atlantic Mobile Systems*)

(See also: Application, Amendment of, Right to File — *Celcom, Inc.*)

(See also: Application, Amendment of, Right to File — *MV Cellular, Inc.*)

(See also: Application, Amendment of, Right to File — *Vineyard Cellular Communications*)

(See also: Application, Not Acceptable for Filing — *Artcell Inc.*)

(See also: Application, Not Acceptable for Filing — *American Cellular Corp.*)

(See also: Application, Not Acceptable for Filing — *Peoria MSA Limited Partnership*)

Mobile Radio Service, Cellular Applications
(See: Cellular Communications Systems — *Celcom Communications Corp.*)

Newspaper Ownership
(See: Anticompetitive Practice — *WDAY, Inc.*)

Notice, Sufficiency of
(See: Application, Amendment of, Right to File — *Bell Atlantic Mobile Systems*)

(See also: Application, Amendment of, Right to File — *Celcom, Inc.*)

(See also: Application, Amendment of, Right to File — *Vineyard Cellular Communications*)

Ownership
(See: Application, Amendment of, Right to File — *MV Cellular, Inc.*)

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(See: Comparative Coverage Issue — *Christian B/cing of Midlands, Inc.*)

Reconsideration, Petition For, Treated as Appropriate for Review
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(See also: Application, Amendment of, Right to File — *American Cellular Corp.*)

(See also: Application, Amendment of, Right to File — *American Cellular Enterprises*)

(See also: Application, Amendment of, Right to File — *Bell Atlantic Mobile Systems*)

(See also: Application, Amendment of, Right to File — *Celcom, Inc.*)

(See also: Application, Amendment of, Right to File — *MV Cellular, Inc.*)

(See also: Application, Amendment of, Right to File — *Vineyard Cellular Communications*)

(See also: Application, Not Acceptable for Filing — *American Cellular Corp.*)

(See also: Application, Not Acceptable for Filing — *Artcell*)

Real Party in Interest
(See: Character Qualifications, Effect of Misrepresentation — *Bellingham TV Assn., Ltd.*)

Remand From Court of Appeals
(See: CATV Program Exclusivity, Network Programming — *KCST-TV, Inc.*)

Review, Application for
(See: Application, Not Acceptable for Filing — *Peoria MSA Limited Partnership*)

Rules, Failure to Conform
(See: Application, Amendment of, Right to File — *Amer. Lo-Power TV Netwk., Inc.*)

(See also: Application, Amendment of, Right to File — *American Cellular Corp.*)

(See also: Application, Amendment of, Right to File — *American Cellular Enterprises*)

(See also: Application, Not Acceptable for Filing — *Artcell*)

(See also: Application, Amendment of, Right to File — *Bell Atlantic Mobile Systems*)

(See also: Application, Amendment of, Right to File — *Celcom, Inc.*)

(See also: Application, Amendment of, Right to File — *MV Cellular, Inc.,*)

(See also: Application, Not Acceptable for Filing — *American Cellular Corp.*)

(See also: Application, Not Acceptable for Filing — *Peoria MSA Limited Partnership*)

Rules, Waiver
(See: CATV Program Exclusivity, Network Programming — *KCST-TV, Inc.*)

Site Availability
(See: Application, Not Acceptable for Filing — *American Cellular Corp.*)

(See also: Misrepresentation — *Professional Radio, Inc.*)

Site Misrepresentation
(See: Misrepresentation — *Professional Radio, Inc.*)

Tariff, Cost Support Material
(See: Common Carrier, Rate or Tariff, Unlawful — *AT&T Communications*)

Tariff, Discrimination
(See: Common Carrier, Rate or Tariff, Unlawful — *AT&T Communications*)

Tariff, Investigation
(See: Common Carrier, Rate or Tariff, Unlawful — *AT&T Communications*)

(See also: Common Carrier, Tariffs, Software Defined Networks, Virtual Private — *AT&T Communications*)

**Tariff, Just and Reasonable Charges**
**(See: Common Carrier, Rate or Tariffic, Unlawful — *AT&T Communications*)**

**Comparative Hearing**
**Interlocutory Ruling, Petition for Reconsideration of, Denied or Dismissed**
**Issue, Clarification or Enlargement of, Need for Motion for**

**Review Board denied reconsideration of *Memorandum Opinion and Order*, FCC 85R-90, released November 7, 1985, which remanded proceeding on transmitter site availability issue. Requests for reconsideration of interlocutory orders, or to rehash matters addressed and resolved, are impermissible. Clarification or addition of issues requires filing proper motion with ALJ.**
**—*Alden Communications Corp.***
**MM Docket No. 83-720**

FCC 86R-5

## BEFORE THE
## FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

| In re Applications of | |
|---|---|
| ALDEN COMMUNICATIONS CORP.<br>Green Valley, Arizona | MM Docket<br>No. 83-720<br>File No.<br>BPCT-830311KF |
| SUNGILT CORPORATION, INC.<br>Green Valley, Arizona | MM Docket<br>No. 83-721<br>File No.<br>BPCT-830311KN |
| For Construction Permit | |

### MEMORANDUM OPINION AND ORDER

Adopted: January 27, 1986; Released: January 28, 1986

BY THE REVIEW BOARD:

1. Two competing television applicants, Alden Communications and Sungilt Corporation, seek reconsideration of our *Memoran-*

*dum Opinion and Order*, FCC 85R-90, released November 7, 1985, remanding this proceeding to the presiding Judge on a basically disqualifying issue to determine whether Sungilt has reasonable assurance of its transmitter site.

2. In its petition for partial reconsideration, Alden in essence seeks clarification of our remand order. It points out that in *South Florida Broadcasting Company, Inc.*, 99 FCC 2d 840, 57 RR 2d 495 (Rev. Bd. 1984), we specified separate issues to determine: (1) which applicants, if any, had reasonable assurance of an antenna site; (2) whether any such reasonable assurance was subsequently vitiated; (3) the bases upon which the applicants have continued to assert reasonable assurance; and (4) whether the applicants presently have reasonable assurance. Alden would prefer that these issues be added against Sungilt instead of the single issue specified in our remand order. We shall dismiss Alden's petition as an unauthorized pleading because it is an impermissible request for reconsideration of an interlocutory order. *See* 47 CFR §§ 1.102(b)(2), 1.106(a)(1), and 1.291(c)(3); *Huntingdon Broadcasters, Inc.*, 2 FCC 2d 525, 6 RR 2d 944 (1966); *CBS, Inc.*, 51 FCC 2d 651, 32 RR 2d 1664 (Rev. Bd. 1975). Moreover, clarification of existing issues or addition of new issues should be sought in the first instance through the filing of a proper motion, supported by specific and sufficient allegations of fact, before the presiding ALJ. 47 CFR §§ 1.229, 1.243(k), and 1.248(c); *Springfield Television Broadcasting Corp.*, 2 RR 2d 841 (Rev. Bd. 1964); *cf. CBS, Inc., supra*, 51 FCC 2d at 651 and n.2, 32 RR 2d at 1665 and n.2.

3. In its petition for reconsideration, Sungilt claims that: (1) our remand order ignored the claim of reasonable assurance of site availability set forth in its counsel's affidavit, Alden Exceptions at Annex 3; (2) "the Board misapplied the facts herein"; and (3) the Arizona Land Department letter of September 30, 1985, because it was "sent directly to the individual members of the Review Board," constitutes evidence of an improper *ex parte* communications instigated by Alden for which we should impose a sanction against Alden. We shall deny Sungilt's petition. First, it too is an impermissible request for reconsideration of an interlocutory order. *See Huntingdon, supra; CBS, supra.* In addition, it is deficient on the merits because in our remand order we specifically considered the previously noted affidavit of Sungilt's counsel and found it insufficient to demonstrate reasonable assurance of site availability, FCC 85R-90 at paras. 4-5. Therefore, with regard to this matter, as well as Sungilt's

contention that we "misapplied the facts," we point out that reconsideration will not be granted in order to rehash matters previously addressed and resolved. *See San Joaquin TV Improvement Corp.*, 96 FCC 2d 617, 618, 55 RR 2d 1186, 1187 (Rev. Bd. 1984) (*citing WWIZ, Inc.*, 37 FCC 685, 686, 3 RR 2d 316, 317 (1964), *aff'd sub nom Lorain Journal Co.* v. *FCC*, 351 F. 2d 824 (D.C. Cir.), *cert. denied*, 383 U.S. 967 (1966)). Finally, Sungilt has failed to make a *prima facie* showing in support of an *ex parte* communication issue against Alden. Should it wish to raise this matter with the ALJ, it will need to comply with the full requirements of Section 1.229 of the Rules and file a completely factually supported motion to enlarge issues requesting the ALJ to specify an appropriate issue. *See Milam and Lansman*, 4 RR 2d 463 (Rev. Bd. 1964); *see also* FCC 85R-90, *supra*, at n.1.[1]

4. ACCORDINGLY, IT IS ORDERED, That the petitions for acceptance of pleading or for alternative relief, and for partial reconsideration, filed December 9, 1985 by Alden Communications Corp., and the motion to strike petition for partial reconsideration filed January 10, 1986 by Sungilt Corporation, Inc. ARE DISMISSED; and

5. IT IS FURTHER ORDERED, That the petition for reconsideration filed December 9, 1985 by Sungilt Corporation, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
JOSEPH A. MARINO, *Chairman, Review Board*

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[1] We note with approval that the presiding Judge has taken firm procedural command of this case, which, based on our past experience with counsel for both applicants, is fully justified. *See Memorandum Opinion and Order,* FCC 86M-291, released January 23, 1986.

Application, Amendment of, Right to File
Application, Not Acceptable for Filing
Financial Qualifications, Availability of Funds
Mobile Radio Service, Cellular
Reconsideration, Petition for, Treated as Appropriate for Review
Rules, Failure to Conform

Order on Reconsideration adopted regarding the return of Round IV cellular applications for failure to demonstrate a reasonable assurance of the availability of proposed debt or equity financing referred to Commission in order to reach a final decision on acceptability for filing with a minimum of delay. A total of 151 applications were determined to have been properly returned because they failed to tender bank commitment letters which include essential terms or provide guarantees for funding sufficient to cover the total estimated costs. Three petitions were granted to correct staff errors. —*Amer. Lo-Power TV Netwk., Inc.*

FCC 86-41

**BEFORE THE**

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re

Petitions for Reconsideration of the
Return of Round IV Cellular Applications
for Inadequate Financial Showing

### ORDER ON RECONSIDERATION

Adopted January 17, 1986; Released January 24, 1986

BY THE COMMISSION:

1. Various Round IV cellular applicants seek reconsideration of the actions of the Chief, Mobile Services Division, returning their applications as unacceptable for filing. The petitions for reconsideration have been referred to the Commission under Section 1.106(a)(1) of the rules in order to expedite a final decision on the matters raised. The primary reason for return of the applications

listed in the Attachment hereto was their failure to demonstrate a reasonable assurance of the availability of funds needed to construct the proposed system and operate it for one year, as required by Section 22.917 of the Commission's rules. Accordingly, the listed applications have been consolidated for reconsideration.

## *Discussion*

### *A. Demonstration of Financial Ability is a Basic Qualifications Requirement*

2. From the inception of the Commission's licensing of cellular systems, one of the basic qualifications requirements has been that applicants must demonstrate that they are financially qualified. In *Cellular Communications Systems,* 86 FCC 2d 469, 501 (1981) (*Report and Order*), we stated that: "Cellular applicants must demonstrate that they are financially qualified to construct their proposed facility and to operate it for a reasonable period of time." With regard to financial ability, the prevailing standard is one of "reasonable assurance" that the funds needed to construct the proposed system and operate it for one year would be available. *Advance Mobile Phone Service, Inc.,* 91 FCC 2d 512, 516–17 (1982) (*Chicago Designation Order*).

3. When we proposed to adopt a lottery selection process for cellular applications, we stated:

> In order for applications to be included in the lottery, they will have to be acceptable for filing under our cellular rules. We will not permit applicants to meet our strict standards by means of later-filed amendments. (Footnote omitted).

Notice of Proposed Rulemaking, 48 Fed. Reg. 51493, 51495, November 9, 1983. In *Cellular Lottery Rulemaking,* 98 FCC 2d 175 (1984) (*Lottery Order*), the Commission reiterated that "Applicants must show financial ability (Section 22.917) . . . before their applications will be accepted for filing." *Lottery Order, supra,* at 213. We also amended Section 22.918(b) to prohibit the filing of any amendments to fourth round cellular applications prior to lottery, stating "cellular applicants should by this time be able to file complete and accurate applications . . . ." *Lottery Order, supra,* at 220. Finally, we notified cellular applicants that "The staff will carefully pre-screen the cellular applications to ensure that deficient applications are not included in the lottery." *Lottery Order, supra,* at 185. Thus, fourth round cellular applicants were on notice that the reasonable assurance standard of financial ability would be applied in determining the acceptability of fourth round applications, and that applicants could not cure any defects, however minor, in order to gain entrance to the lottery.

### *B. Insufficient Loan Amount*

4. Six petitioners seek reconsideration of the return of their applications based on the failure of their bank commitment letters to demonstrate the availability of sufficient funds to satisfy the estimated construction and first-year operating expenses. An application filed by Singleton Communications Corporation (Singleton)[1] contained a loan commitment which was $100,000 less than the total estimated costs of $1,600,000, while an application filed by LBT Communications Company (LBT)[2] contained a bank commitment letter which was $375,000 less than the $1,875,000 projected costs. Both Singleton and LBT argue that the shortfall in their bank commitments was the result of a misunderstanding with their application preparer, Cellular Ventures, Inc., but contend that they are financially qualified to construct and operate the proposed systems.[3] Cellular West, Inc. (CWI)[4] filed an application which included a bank commitment letter of $1,000,000. CWI now argues that this letter contained a typographical error and should have provided a loan commitment for $5,000,000. CWI contends that administrative fairness demands that it be allowed to cure this inadvertent typographical error since other applications with marginal financial showings have been accepted for lottery consideration. Metro Cellular Telecommunications, Inc. (Metro)[5] filed Petitions for Reconsideration of the return of six of its applications. These applications were

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[1] Application Number 123 in the Attachment.

[2] Application Number 115 in the Attachment.

[3] Both Singleton and LBT argue that they had demonstrated sufficient financial ability to construct and operate their proposed systems despite the noted shortfall of their bank commitments. Singleton argues that the $117,000 listed on the corporation's balance sheet as "cash and investments" was actually net liquid assets in the form of a bank checking account and would have satisfied the $100,000 shortfall. LBT seeks to amend its application to include the confidential financial statements of its three partners and their assurances that construction costs would be met from personal assets as necessary. LBT argues that the apparent shortage in committed debt financing is irrelevant in light of the aggregrate net liquid assets of the partners which is more than 10 times the total costs of the project. LBT asserts that the Commission should allow its amendment, even though pre-lottery amendments are prohibited, just as those applicants which were determined to have faulty site availability showings were allowed to cure such deficiencies.

[4] Application Number 54 in the Attachment.

[5] Application Numbers 116–121 in the Attachment.

returned because the bank letters listed loan commitments of $20,000 less than the estimated construction and operating costs for each application. Metro asserts that the $20,000 shortage in five of its applications[6] was a minor typographical error and should be allowed to be cured by amendment. Metro includes a letter from the bank confirming Metro's contentions and containing new financing guarantees in sufficient amounts. Metro argues, however, that the Commission erred in returning the sixth application, File No. 31068-CL-P-104-A-84.[7] Metro argues that the bank letter included in this application committed financing for precisely the amount of the estimated construction and first year operating costs. Tel-Share Telecommuncations, Inc. (Tel-Share)[8] seeks reconsideration of the return of its involved application contending that the funding shortage of approximately $140,000 was due to inadvertent errors in its balance sheet which underestimated its net liquid assets. Tel-Share also asserts that the bank commitment letter should have guaranteed funding for the total estimated construction and operating costs and submits a new bank letter sufficient to meet all projected costs. Tel-Share states that it currently has substantial net liquid assets and asserts that it overstated its financial requirements in projecting initial construction and operating costs. Finally, Intercontinental Communications Cellular, Inc. (Intercontinental)[9] filed a Petition for Reconsideration of the return of one of its applications for failure to demonstrate the availability of sufficient funding to cover the total operating costs for all 30 cellular systems proposed. Intercontinental argues that the $16,000,000 bank commitment letter contained in its application was more than sufficient to meet total first-year operating expenses projected for all thirty markets ($14,214,400), and that its application should have been accepted for filing.

5. After a thorough examination of the facts and arguments presented by the applicants described above, we find that with two exceptions the staff was correct in returning these applications as defective. The applications filed by Singleton, LBT, CWI, and Tel-Share, as well as five of the applications filed by Metro,[10] contained financial showings in amounts insufficient to satisfy the proposed construction and first-year operating costs. The misun-

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[6] Application Numbers 116-117, 119-121 in the Attachment.
[7] Application Number 118 in the Attachment.
[8] Application Number 154 in the Attachment.
[9] Application Number 114 in the Attachment.
[10] Application Numbers 116-117, 119-121 in the Attachment.

derstandings alleged by Singleton and LBT do not constitute adequate grounds for justifying waiver of the pre-lottery amendment prohibition of Section 22.918(b) of the Commission's rules, and the post-filing clarifications and additional financial evidence offered by Singleton and LBT must be rejected as prohibited amendments. CWI, Metro and Tel-Share each allege that their deficient bank commitments were the result of inadvertent typographical errors in the bank letters submitted. Section 22.33(g)(5) of the Commission's rules generally permits amendments which correct "typographical, transcription, or similar clerical errors which are clearly demonstrated to be mistakes by reference to other parts of the application . . . " to qualify as an exception to major amendment classification. However, Tel-Share and Metro have not referred to any other portion of their applications which demonstrates that the bank loan amounts were typographical mistakes. The statements by Metro's banker concerning the alleged typographical errors in the bank letter submitted by Metro, standing alone, do not satisfy the demonstration requirements of Section 22.23(g)(5). Moreover, even if a typographical error had been demonstrated, the new bank commitment letters submitted by Metro and Tel-Share must be rejected as impermissible pre-lottery amendments under Section 22.918(b). *See Digital Transmission Corporation,* Mimeo No. 6705, released August 30, 1985. Finally, while CWI's application contains a statement which appears to be inconsistent with the loan commitment, we do not believe that the statement demonstrates that the loan amount was a typographical error. In Exhibit Gen-3 of its application, CWI states: "The WestAmerica Bank in Vallejo, California is prepared to make available to [CWI] financing up to $5,000,000 for this cellular system. Included in this exhibit is the bank letter from WestAmerica Bank which demonstrates the availability of the necessary funding." The bank letter, however, states: " . . . we will consider a $1,000,000.00 loan request from [CWI] to finance the construction of Cellular Tele Communications in the [Vallejo] area . . . " While these statements are definately inconsistent, the application statements could have resulted from miscommunication or a misunderstanding between CWI and the bank rather than from a typographical error. As CWI stated in its Petition: "It was [CWI's] understanding that a $5,000,000 letter would be furnished and, indeed that was what had been contemplated." Furthermore, CWI submitted no evidence from WestAmerica Bank that its commitment letter contained a typographical error. Finally, CWI's administrative fairness argument must fail as it has not identified any other Round IV application with a "marginal financial showing" that was accepted for filing. Under these circumstances, we conclude that CWI has failed to satisfy the demonstration requirements of Section 22.23(g)(5), and that the new commitment letter of The Crocker Bank submitted by CWI must be rejected as an impermissible pre-lottery amendment under Section 22.918(b) of the Commission's rules.[11] Accordingly, the petitions listed above will be denied. Further, we find that two of the involved applications were erroneously returned as defective. Metro's application to serve the Newport News-Hampton, Virginia MSA (File No. 31068-CL-P-104-A-84)[12] demonstrated bank financing in an amount sufficient to construct and operate the proposed facility. Similarly, Intercontinental's application contained a bank commitment sufficient to finance all of its Round IV cellular proposals. These two Petitions will be granted, and the applications will be reinstated.

### *C. Inadequate Bank Commitment Letter*

6. Cable Advertising Systems, Inc. (CASI)[13] and American Lo-Power Television Network, Inc. (Lo-Power)[14] seek reconsideration of the return of their Round IV cellular applications as unacceptable for filing under Section 22.917(e)(1) of the Commission's rules because of inadequate bank commitment letters. CASI's applications sought to demonstrate financial ability through a letter from United Texas Bancshares, Inc.[15] Though

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[11] We also reject the arguments that our refusal to permit financial amendments would constitute uneven treatment proscribed by the Court in *Green Country Mobilephone, Inc.* v. *F.C.C.*, 765 F. 2d 235 (D.C. Cir. 1985). Round IV cellular applicants were on notice that the reasonable assurance standard of financial ability would be applied in determining the acceptability of fourth round applications, and that applicants could not cure any defects, however minor, in order to gain entrance to the lottery. *Notice of Proposed Rulemaking,* 48 Fed. Reg. 51493, 51495, November 9, 1983; *Cellular Lottery Rulemaking*, 98 FCC 2d 175, 213 and 220 (1984). The petitioners herein, who submitted deficient financial qualifications demonstrations despite the Commission's specific warnings noted above, are simply not in a position comparable to the applicants affected by Public Notice, CL-304, released April 26, 1985, which was issued in response to widespread and justifiable confusion among applicants regarding two specific cellular application requirements.

[12] Application No. 118 in Attachment.

[13] Application Numbers 32-51 in the Attachment.

[14] Application Numbers 1-30 in the Attachment.

[15] This letter stated, "Based on my knowledge of the group of people associated with Cable Advertising, Inc., it is my opinion that this entity is fully capable of obtaining the necessary funds necessary to establish and operate cellular mobile systems in any individual market for which their application is selected. We

acknowledging that it may have sought to prove its financial ability by reliance on the general public recognition of its officers, directors, and major stockholders, CASI maintains that the bank commitment letter contained in its applications clearly demonstrated that the corporation was financially qualified to construct and operate the proposed systems. CASI now seeks to amend its applications to include new bank commitment letters and balance sheets to prove its financial qualifications. Lo-Power, on the other hand, generally concedes that its financial showing was inadequate and argues only that the Commission's refusal to allow curative amendments for its financial showing was erroneous as a matter of law and denied procedural due process.

7. We find no merit in the arguments made by either CASI or Lo-Power. Section 22.917(e)(1) requires cellular applicants to provide the Commission with details concerning any loans or credit arrangements. We have long required the inclusion of essential terms in bank letters as a prerequisite to a finding of reasonable assurance that funds will be available. *See Multi-State Communications, Inc.* v. *FCC,* 590 F. 2d 1117 (D.C. Cir. 1978), *cert. denied,* 440 U.S. 959 (1979) and *Merrimack Valley Broadcasting, Inc.,* 82 FCC 2d 166 (1980). The *Multi-State* and *Merrimack Valley* requirements are clearly applicable to cellular applications. *See GTE Mobilnet of San Jose, Inc.,* 54 RR 2d 321 (1983); *Cellular Communications of Cincinnati,* 53 RR 2d 827 (1983); and *Advanced Mobile Phone Service, Inc.,* 52 RR 2d 1045 (1982). Under the *Multi-State* and *Merrimack Valley* standards, the financial commitments secured by CASI and Lo-Power are totally defective. Neither letter contained a commitment for financing. CASI's showing that United Texas Bancshares would "welcome an opportunity to participate as lender" does not indicate more than a detached interest in the proposal. Further, CASI's letter stated no terms, not even the amount, of any proposed loan, and Lo-Power's submission stated only the interest rate (two percent over prime) and term without stating the amount of the loan. These letters clearly failed to provide the information necessary to demonstrate a "reasonable assurance" of financing as required by Section 22.917(e)(1). Further, we find no merit in Lo-Power's argument that the refusal to allow it to file curative amendments denies procedural due process and is erroneous as a matter of law. *See Rochelle C. Salzer v. FCC,* No. 84-1527 (D.C. Cir., December 13, 1985). Lo-Power was clearly on notice prior to filing its

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have reviewed the financial requirements of this venture and would welcome an opportunity to participate as lender."

application that no curative amendments would be allowed. *See Lottery Order, supra,* at 185, and note 12, *supra.* Accordingly, we find that the Petitions of CASI and Lo-Power lack merit and will be denied.

### *D. Inadequate Debt or Equity Commitment*

8. Consab Ventures (Consab),[16] Global Cellular Systems, Inc. (Global),[17] and Southern Cellular Radio Systems, Inc. (Southern),[18] have filed Petitions for Reconsideration of the return of their applications to serve all Round IV markets based on a defective financing commitment letter. The Staff determined that each of these applications was defective because it relied on a commitment letter from Stephens, Inc. which failed to disclose details of any equity funding, loan or other form of credit arrangement. Consab, Global and Southern assert that the Stephens letter constituted the expert opinion of an established investment banking firm concerning their ability to raise the necessary capital and a commitment by the firm to act as managing underwriter in the proposed equity offerings.[19] They argue that the letter was intentionally broad to include the possibility of using either debt financing, equity financing, or a combination of both, and assert that this was sufficient to prove financial qualifications under existing Commission precedent. Further, all three applicants, in their Petitions, tendered bank commitment letters, corporate balance sheets, declarations and a more detailed

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[16] Applications Nos. 55-83 in Attachment.

[17] Applications Nos. 84-113 in Attachment.

[18] Applications Nos. 124-153 in Attachment.

[19] The applications filed by Consab, Global and Southern contain a letter from the Vice President of Stephens, Inc. which notes that the firm has reviewed the cellular proposals and asserts that he was convinced that the applicants will be able to successfully develop and implement cellular mobile radio service in the Round IV markets. The letters stated, "Further, we have had significant experience in arranging financing for new companies such as yours that intend to participate in emerging technologies. Accordingly, we are willing to act as your agent to raise the $50 million of financing required to construct and commence operation of the proposed systems. Should a public offering become part of the financing package, we agree to act as managing underwriter with respect to such proposed offering." Noting that the ability to raise capital would depend upon various factors (awarding of licenses, market conditions at time of financing, and realization of operating performance and satisfaction of other capital requirements as set forth in financial projections), the letter concluded, "However, based upon the information that you have provided to us, we believe that the necessary capital of approximately $50 million can be raised by our organization."

letter from Stephens, Inc. concerning the intended equity or debt financing.[20]

9. Section 22.917(e) requires applicants to submit the details of any loan or other form of credit arrangement intended to be utilized to finance the proposed facility and the "details of any sale or placements of any equity or other form of ownership interests." Though the letter indicates that Stephens, Inc. may assist Consab, Global and Southern in arranging financing, the letter evidences no commitment to loan the funds necessary to construct and operate these applicants' Round IV cellular proposals. The letter was described as an "opinion" and provides no information about potential lending institutions and no details concerning any specific credit arrangement. Clearly, the letter failed to provide a "reasonable assurance" that debt financing had been committed to these projects. *See Multi-State* and *Merrimack Valley, supra.* We are similarly not convinced by the Stephens assurances concerning equity financing. Stephens, Inc. concluded that Consab, Global and Southern will be able to successfully develop and implement cellular mobile radio service and raise the necessary capital to do so. This conclusion was based on an examination of existing data and projected trends in the cellular industry, a review of FCC cellular proceedings to date, significant general experience as a large investment banking firm, and experience in arranging financing for new companies which intend to participate in emerging technologies. The petitioners argue that their Stephens letter is similar to the letter relied upon by Cellular Mobile Systems of Illinois, Inc. (CMS) in the Chicago cellular proceeding. *See Advanced Mobile Phone Service, Inc.,* 91 FCC 2d 512, 517 (1982). We disagree. In that case, the Commission was persuaded by E. F. Hutton's management of three successful financings on behalf of Graphic Scanning Corporation, CMS' parent, in the previous two and one-half years and the careful analysis it had made of Graphic's "financial position, current capitalization and future business plans, among other things." We must conclude that the Stephens letter is similar to the equity financing proposal disallowed in *Cellular Communications of Cincinnati* 53 RR 2d 827 (1983), at para. 8. Like the disallowed Cincinnati letter, Stephens did not provide any terms or details of

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[20] The bank commitment letters and the detailed letter from Stephens, Inc. filed on June 27, 1985, cannot be considered in evaluating the financial qualifications of Consab, Global or Southern. As noted earlier, the Commission has prohibited the filing of amendments in Round IV applications prior to lottery. See Section 22.918(b) of the Commission's rules; and Digital Transmission Corporation, Mimeo No. 6705, released August 30, 1985.

the offering and failed to state whether it had any specific experience managing underwritings for the petitioners or their principals. Further, the Stephens letter did not indicate that it was familiar with the marketplace reaction to the individual applicants, and showed far less analysis and commitment to the Consab, Global and Southern proposals. For this reason, we find that the Consab, Global and Southern applications were properly returned as defective for failing to demonstrate their financial qualifications. Their Petitions will be denied.

### *E. Facsimile Bank Commitment Letter*

10. Caribbean Cellular Communications, Inc. (CCC)[21] filed a Petition for Reconsideration and Request for Acceptance of Amendment. CCC's San Juan/Caguas, Puerto Rico application contained an unsigned facsimile bank commitment letter and was returned as defective. CCC argues on reconsideration that its application should not have been returned because the facsimile financing letter contained the proposed loan amount, an indication of the lender, and otherwise satisfied the Commission's loan commitment requirements. Furthermore, on July 17, 1984, CCC submitted an amendment to its application which attached the signed original of the bank letter. This amendment was rejected as "untimely." CCC again submits a curative amendment as part of its Petition for Reconsideration.

11. We agree with CCC. The unsigned facsimile bank commitment letter was filed with the application along with a statement that the original letter would be promptly submitted. The original letter, which was dated July 13, 1984, was delayed in the mail from Puerto Rico and was promptly tendered for filing on the day after the application filing deadline. This letter contained all the terms necessary to provide reasonable financial assurances. In light of these circumstances, we do not believe that the lack of a signature on the facsimile copy of a supporting document timely filed is fatal. *See e.g. Communication Gaithersburg, Inc. et al.*, 60 FCC 2d 537, 541–542 (1976) and citations therein. Accordingly, we find that CCC has demonstrated its financial ability, and the application should have been accepted for filing. We will grant CCC's Petition and reinstate its application.

### *F. Insufficient Financing for Non-Equipment Costs.*

12. Cellular America (CA)[22] and New York Independent Cellular

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[21] Application No. 52 in Attachment.

[22] Application No. 53 in Attachment.

Partnership (NYIC)[23] have filed Petitions for Reconsideration of the return of two of their applications. Each argues that its total financing package was sufficient to satisfy the total projected cost for all of its proposals, and seeks clarification of the specific reasons for the return of its applications. Specifically, CA contends that the total financing package ($35,000,000 from ITT Credit Corporation to cover equipment purchase costs and $15,000,000 from the Fourth National Bank of Tulsa to cover non-equipment costs) comfortably exceeds the total financial requirements of its 29 proposed systems by more than $7,000,000. NYIC also asserts that its application contained sufficient financial commitments ($1.2 million from ITT Credit Corporation to finance the switch and related RF equipment and $500,000 from Marine Midland Bank) to finance its proposal.

13. After a careful examination of the various costs and financial commitments of these two applicants, we find no merit in the arguments made by CA and NYIC. Each applicant has failed to demonstrate sufficient non-equipment financing to cover its estimated non-equipment costs. CA's proposals will require more than the $15,125,000 available to cover its total non-equipment costs.[24] We find that CA's non-equipment costs in markets 91-117 will amount to $14,779,214.[25] The estimated non-equipment costs of CA's additional proposals in markets 119 ($458,885) and 120 ($813,360) will cause the total to exceed the $15,125,000 which is available. Thus, the Bureau acted properly in returning CA's application for Market 120 as defective and the Petition for Reconsideration is without merit and will be denied.[26]

14. The application filed by NYIC was similarly flawed and was properly returned as defective and unacceptable for filing. NYIC's application included a $1.2 million commitment from ITT Credit

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[23] Application No. 122 in Attachment.

[24] Fifteen million dollar bank loan and $125,000 in cash from the applicant's balance sheet.

[25] In calculating the total non-equipment costs we have analyzed Exhibit 8 in each of CA's applications and have added CA's estimated "operating expenses", "pre-operational expenses," "land, buildings, towers, etc." and "miscellaneous expenses" and subtracted "depreciation and amortization." The estimated costs for "land, buildings, towers, etc." and "miscellaneous expenses" are not logically the types of costs that would be covered by an equipment financing contract for "cellular mobile telephone equipment manufactured by ITT, or its subsidiaries, and the E. F. Johnson Company," nor was the ITT commitment to finance such costs demonstrated in the application.

[26] In addition, it appears that the Division erred in accepting CA's application for Market number 119, apparently due to a mathematical error in calculating the total non-equipment financing needed. Accordingly, we have directed the staff to return CA's application for Market number 119 as unacceptable for filing.

Corporation to finance the switch and related RF equipment and a commitment of $500,000 from Marine Midland Bank. The non-equipment costs, including Operating expenses ($483,100), pre-operating expenses ($15,000), antennas, transmission lines ($14,000), land, buildings, towers, etc. ($60,000) and miscellaneous ($100,920)[27] minus depreciation and amortization ($114,100), would equal $558,920. This amount exceeds the $500,000 loan commitment from the bank, so the Bureau was correct to conclude that NYTC's financial showing was inadequate and reconsideration will be denied.

### *G. No Details of External Financing*

15. CP National Corporation (CP)[28] seeks reconsideration of the return of its application for failing to demonstrate the availability of its proposed external financing. CP's application states:

> Initial capitalization is proposed to be undertaken through generation of funds committed to no other project on a 50% external/50% internal basis. Subsequent capital investment will be accomplished solely through internal capital generation. CP National submits its latest 10Q Report filed . . . as evidence of its ability to raise sufficient capital from both internal and external sources to meet initial investment and expenses.

CP's application includes a detailed picture of corporate assets, but fails to disclose the source of the 50% external funding for its proposed system. Though acknowledging that its application did not include a bank commitment letter, specify lines of credit or provide copies of any loan agreement, CP asserts that its application was not defective because it had demonstrated sufficient internally generated funds to construct and operate the proposed system and had sufficient lines of credit to meet its external financing requirements.[29] CP now asserts that it has always had an actual short-term borrowing capacity sufficient to finance 50% of its estimated system costs and seeks to submit materials concerning such loan arrangements.

16. We find no merit in CP's arguments. CP's application did not provide the reasonable assurance required by Section 22.917(e)

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[27] NYTC now asserts that the $100,920 in "Miscellaneous" expenses will be covered under ITT's commitment to provide equipment financing. We must reject this assertion as an impermissible clarifying amendment under Section 22.918(b).

[28] Application No. 31 in Attachment.

[29] Further, CP asserts that it asked for a waiver of the requirement that it submit details of its arrangement with lending institutions at the time it filed its application. CP completely mischaracterizes its waiver request. In fact, the waiver requested related to acceptance of its financial statement which was dated more than 90 days prior to the application filing date.

of the Commission's rules. CP's application specifically proposed that 50% of the estimated construction and operating costs would be financed externally. However, CP's application failed to provide any specific information concerning the external financing it proposed to employ, the lender, or any terms. CP's application clearly failed to demonstrate the necessary reasonable assurance that the proposed external financing would be available. CP's submission of new evidence regarding lines of credit must be rejected as an impermissible amendment pursuant to Section 22.918(b) of the Commission's rules. *See Digital Transmission Corporation*, Mimeo No. 6705, released August 30, 1985. Finally, we do not believe that CP's new assertions regarding its ability to internally finance the entire costs of its proposed system can be credited. While CP's assets are substantial, its application fails to demonstrate that sufficient funds to cover its total projected costs are committed to financing its proposed cellular system and are not committed to other corporate projects, as required by Section 22.917(b). Without such a specific commitment, we are unable to find that CP has demonstrated its financial ability. We find that CP's Petition lacks merit, and it will be denied.

### *Ordering Paragraphs*

17. Accordingly, IT IS ORDERED That the Petitions for Reconsideration filed by American Lo-Power Television Network, Inc., CP National Corporation, Cable Advertising Systems, Inc., Cellular America, Cellular West, Inc., Consab Ventures, Global Cellular Systems, Inc., LBT Communications Company, New York Independent Cellular Partnership, Singleton Communications Corporation, Southern Cellular Radio Systems, Inc., Tel Share Telecommunications, Inc. and Metro Cellular Telecommunications, Inc. ARE DENIED.

18. IT IS FURTHER ORDERED, That the Petitions for Reconsideration filed by Metro Cellular Telecommunications, Inc., File No. 31068-CL-P-104-A-84 (Application No. 118 in Attachment), Intercontinental Communications Cellular, Inc., File No. 33160-CL-P-120-A-84 (Application No. 114 in Attachment) and Caribbean Cellular Communications, Inc., File No. 32058-CL-P-091-A-84 (Application No. 52 in Attachment) ARE GRANTED, and their applications ARE REINSTATED and accepted for filing.

19. A copy of this order will be mailed to the Attorney of

Record or to the Contact Representative designated in each of the involved Petitions for Reconsideration.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

## *Attachment*

### APPLICATIONS ASSOCIATED WITH THIS ORDER

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| 1. American Lo-Power Television Network, Inc. | File No. 30327-CL-P-095-A-84 |
| 2. American Lo-Power Television Network, Inc. | File No. 31222-CL-P-100-A-84 |
| 3. American Lo-Power Television Network, Inc. | File No. 31224-CL-P-096-A-84 |
| 4. American Lo-Power Television Network, Inc. | File No. 33483-CL-P-120-A-84 |
| 5. American Lo-Power Television Network, Inc. | File No. 34996-CL-P-119-A-84 |
| 6. American Lo-Power Television Network, Inc. | File No. 31223-CL-P-118-A-84 |
| 7. American Lo-Power Television Network, Inc. | File No. 30417-CL-P-117-A-84 |
| 8. American Lo-Power Television Network, Inc. | File No. 34199-CL-P-116-A-84 |
| 9. American Lo-Power Television Network, Inc. | File No. 30376-CL-P-115-A-84 |
| 10. American Lo-Power Television Network, Inc. | File No. 33671-CL-P-114-A-84 |
| 11. American Lo-Power Television Network, Inc. | File No. 34280-CL-P-113-A-84 |
| 12. American Lo-Power Television Network, Inc. | File No. 33792-CL-P-112-A-84 |
| 13. American Lo-Power Television Network, Inc. | File No. 34279-CL-P-111-A-84 |
| 14. American Lo-Power Television Network, Inc. | File No. 34984-CL-P-110-A-84 |
| 15. American Lo-Power Television Network, Inc. | File No. 33637-CL-P-109-A-84 |
| 16. American Lo-Power Television Network, Inc. | File No. 34928-CL-P-108-A-84 |
| 17. American Lo-Power Television Network, Inc. | File No. 33468-CL-P-107-A-84 |
| 18. American Lo-Power Television Network, Inc. | File No. 34947-CL-P-106-A-84 |
| 19. American Lo-Power Television Network, Inc. | File No. 31189-CL-P-105-A-84 |
| 20. American Lo-Power Television Network, Inc. | File No. 33507-CL-P-104-A-84 |

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| 21. American Lo-Power Television Network, Inc. | File No. 30367-CL-P-103-A-84 |
| 22. American Lo-Power Television Network, Inc. | File No. 30384-CL-P-102-A-84 |
| 23. American Lo-Power Television Network, Inc. | File No. 34278-CL-P-101-A-84 |
| 24. American Lo-Power Television Network, Inc. | File No. 31185-CL-P-099-A-84 |
| 25. American Lo-Power Television Network, Inc. | File No. 31186-CL-P-098-A-84 |
| 26. American Lo-Power Television Network, Inc. | File No. 30351-CL-P-097-A-84 |
| 27. American Lo-Power Television Network, Inc. | File No. 33525-CL-P-094-A-84 |
| 28. American Lo-Power Television Network, Inc. | File No. 33793-CL-P-093-A-84 |
| 29. American Lo-Power Television Network, Inc. | File No. 33475-CL-P-092-A-84 |
| 30. American Lo-Power Television Network, Inc. | File No. 33579-CL-P-091-A-84 |
| 31. CP National Corporation | File No. 34084-CL-P-101-B-84 |
| 32. Cable Advertising Systems, Inc. | File No. 32382-CL-P-114-A-84 |
| 33. Cable Advertising Systems, Inc. | File No. 30365-CL-P-103-A-84 |
| 34. Cable Advertising Systems, Inc. | File No. 30395-CL-P-120-A-84 |
| 35. Cable Advertising Systems, Inc. | File No. 32087-CL-P-118-A-84 |
| 36. Cable Advertising Systems, Inc. | File No. 31472-CL-P-113-A-84 |
| 37. Cable Advertising Systems, Inc. | File No. 30750-CL-P-112-A-84 |
| 38. Cable Advertising Systems, Inc. | File No. 32383-CL-P-110-A-84 |
| 39. Cable Advertising Systems, Inc. | File No. 32088-CL-P-109-A-84 |
| 40. Cable Advertising Systems, Inc. | File No. 34299-CL-P-108-A-84 |
| 41. Cable Advertising Systems, Inc. | File No. 30372-CL-P-106-A-84 |
| 42. Cable Advertising Systems, Inc. | File No. 31488-CL-P-105-A-84 |
| 43. Cable Advertising Systems, Inc. | File No. 30399-CL-P-100-A-84 |
| 44. Cable Advertising Systems, Inc. | File No. 33023-CL-P-099-A-84 |
| 45. Cable Advertising Systems, Inc. | File No. 34298-CL-P-097-A-84 |
| 46. Cable Advertising Systems, Inc. | File No. 31471-CL-P-096-A-84 |
| 47. Cable Advertising Systems, Inc. | File No. 30751-CL-P-095-A-84 |
| 48. Cable Advertising Systems, Inc. | File No. 30276-CL-P-093-A-84 |
| 49. Cable Advertising Systems, Inc. | File No. 30414-CL-P-092-A-84 |
| 50. Cable Advertising Systems, Inc. | File No. 32180-CL-P-091-A-84 |
| 51. Cable Advertising Systems, Inc. | File No. 35133-CL-P-094-A-84 |
| 52. Caribbean Cellular Communications, Inc. | File No. 32058-CL-P-091-A-84 |
| 53. Cellular America | File No. 31843-CL-P-120-A-84 |
| 54. Cellular West, Inc. | File No. 32954-CL-P-111-A-84 |
| 55. Consab Ventures | File No. 32335-CL-P-108-A-84 |
| 56. Consab Ventures | File No. 32063-CL-P-107-A-84 |
| 57. Consab Ventures | File No. 31543-CL-P-106-A-84 |
| 58. Consab Ventures | File No. 31538-CL-P-105-A-84 |

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| 59. Consab Ventures | File No. 31528-CL-P-104-A-84 |
| 60. Consab Ventures | File No. 31521-CL-P-103-A-84 |
| 61. Consab Ventures | File No. 31526-CL-P-102-A-84 |
| 62. Consab Ventures | File No. 32178-CL-P-101-A-84 |
| 63. Consab Ventures | File No. 30507-CL-P-100-A-84 |
| 64. Consab Ventures | File No. 32331-CL-P-099-A-84 |
| 65. Consab Ventures | File No. 32336-CL-P-098-A-84 |
| 66. Consab Ventures | File No. 32149-CL-P-097-A-84 |
| 67. Consab Ventures | File No. 33047-CL-P-096-A-84 |
| 68. Consab Ventures | File No. 31514-CL-P-095-A-84 |
| 69. Consab Ventures | File No. 31524-CL-P-094-A-84 |
| 70. Consab Ventures | File No. 30927-CL-P-093-A-84 |
| 71. Consab Ventures | File No. 31969-CL-P-092-A-84 |
| 72. Consab Ventures | File No. 31483-CL-P-091-A-84 |
| 73. Consab Ventures | File No. 32586-CL-P-109-A-84 |
| 74. Consab Ventures | File No. 31520-CL-P-111-A-84 |
| 75. Consab Ventures | File No. 31513-CL-P-112-A-84 |
| 76. Consab Ventures | File No. 31530-CL-P-113-A-84 |
| 77. Consab Ventures | File No. 31539-CL-P-114-A-84 |
| 78. Consab Ventures | File No. 30572-CL-P-115-A-84 |
| 79. Consab Ventures | File No. 31547-CL-P-116-A-84 |
| 80. Consab Ventures | File No. 32585-CL-P-117-A-84 |
| 81. Consab Ventures | File No. 32048-CL-P-118-A-84 |
| 82. Consab Ventures | File No. 33083-CL-P-119-A-84 |
| 83. Consab Ventures | File No. 31502-CL-P-120-A-84 |
| 84. Global Cellular Systems, Inc. | File No. 30533-CL-P-091-A-84 |
| 85. Global Cellular Systems, Inc. | File No. 30994-CL-P-092-A-84 |
| 86. Global Cellular Systems, Inc. | File No. 33193-CL-P-093-A-84 |
| 87. Global Cellular Systems, Inc. | File No. 32552-CL-P-094-A-84 |
| 88. Global Cellular Systems, Inc. | File No. 31505-CL-P-095-A-84 |
| 89. Global Cellular Systems, Inc. | File No. 32584-CL-P-096-A-84 |
| 90. Global Cellular Systems, Inc. | File No. 30449-CL-P-097-A-84 |
| 91. Global Cellular Systems, Inc. | File No. 32578-CL-P-098-A-84 |
| 92. Global Cellular Systems, Inc. | File No. 32576-CL-P-099-A-84 |
| 93. Global Cellular Systems, Inc. | File No. 32551-CL-P-100-A-84 |
| 94. Global Cellular Systems, Inc. | File No. 30551-CL-P-101-A-84 |
| 95. Global Cellular Systems, Inc. | File No. 33039-CL-P-102-A-84 |
| 96. Global Cellular Systems, Inc. | File No. 33321-CL-P-103-A-84 |
| 97. Global Cellular Systems, Inc. | File No. 32580-CL-P-104-A-84 |
| 98. Global Cellular Systems, Inc. | File No. 32546-CL-P-105-A-84 |
| 99. Global Cellular Systems, Inc. | File No. 32553-CL-P-106-A-84 |
| 100. Global Cellular Systems, Inc. | File No. 33096-CL-P-107-A-84 |
| 101. Global Cellular Systems, Inc. | File No. 32550-CL-P-108-A-84 |
| 102. Global Cellular Systems, Inc. | File No. 30968-CL-P-109-A-84 |
| 103. Global Cellular Systems, Inc. | File No. 32579-CL-P-110-A-84 |
| 104. Global Cellular Systems, Inc. | File No. 31509-CL-P-111-A-84 |
| 105. Global Cellular Systems, Inc. | File No. 30484-CL-P-113-A-84 |
| 106. Global Cellular Systems, Inc. | File No. 30831-CL-P-114-A-84 |
| 107. Global Cellular Systems, Inc. | File No. 32577-CL-P-115-A-84 |
| 108. Global Cellular Systems, Inc. | File No. 31316-CL-P-116-A-84 |
| 109. Global Cellular Systems, Inc. | File No. 32113-CL-P-117-A-84 |

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| 110. Global Cellular Systems, Inc. | File No. 32583-CL-P-119-A-84 |
| 111. Global Cellular Systems, Inc. | File No. 30653-CL-P-120-A-84 |
| 112. Global Cellular Systems, Inc. | File No. 30784-CL-P-118-A-84 |
| 113. Global Cellular Systems, Inc. | File No. 33213-CL-P-112-A-84 |
| 114. Intercontinental Communications/Cellular, Inc. | File No. 33160-CL-P-120-A-84 |
| 115. LBT Communications Company | File No. 31671-CL-P-092-A-84 |
| 116. Metro Cellular Telecommunications, Inc. | File No. 30068-CL-P-096-A-84 |
| 117. Metro Cellular Telecommunications, Inc. | File No. 31076-CL-P-099-A-84 |
| 118. Metro Cellular Telecommunications, Inc. | File No. 31068-CL-P-104-A-84 |
| 119. Metro Cellular Telecommunications, Inc. | File No. 31080-CL-P-111-A-84 |
| 120. Metro Cellular Telecommunications, Inc. | File No. 30055-CL-P-112-A-84 |
| 121. Metro Cellular Telecommunications, Inc. | File No. 31079-CL-P-114-A-84 |
| 122. New York Independent Cellular Partnership, Utica/Rome | File No. 30571-CL-P-115-B-84 |
| 123. Singleton Communications Corporation | File No. 35200-CL-P-111-A-85 |
| 124. Southern Cellular Radio Systems, Inc. | File No. 32000-CL-P-116-A-84 |
| 125. Southern Cellular Radio Systems, Inc. | File No. 31477-CL-P-091-A-84 |
| 126. Southern Cellular Radio Systems, Inc. | File No. 31699-CL-P-092-A-84 |
| 127. Southern Cellular Radio Systems, Inc. | File No. 30920-CL-P-093-A-84 |
| 128. Southern Cellular Radio Systems, Inc. | File No. 31702-CL-P-094-A-84 |
| 129. Southern Cellular Radio Systems, Inc. | File No. 32177-CL-P-095-A-84 |
| 130. Southern Cellular Radio Systems, Inc. | File No. 32220-CL-P-096-A-84 |
| 131. Southern Cellular Radio Systems, Inc. | File No. 31171-CL-P-097-A-84 |
| 132. Southern Cellular Radio Systems, Inc. | File No. 32106-CL-P-098-A-84 |
| 133. Southern Cellular Radio Systems, Inc. | File No. 33031-CL-P-099-A-84 |
| 134. Southern Cellular Radio Systems, Inc. | File No. 32353-CL-P-100-A-84 |
| 135. Southern Cellular Radio Systems, Inc. | File No. 30550-CL-P-101-A-84 |
| 136. Southern Cellular Radio Systems, Inc. | File No. 31500-CL-P-102-A-84 |
| 137. Southern Cellular Radio Systems, Inc. | File No. 30838-CL-P-103-A-84 |
| 138. Southern Cellular Radio Systems, Inc. | File No. 33290-CL-P-104-A-84 |
| 139. Southern Cellular Radio Systems, Inc. | File No. 32111-CL-P-105-A-84 |
| 140. Southern Cellular Radio Systems, Inc. | File No. 31319-CL-P-106-A-84 |
| 141. Southern Cellular Radio Systems, Inc. | File No. 31481-CL-P-107-A-84 |
| 142. Southern Cellular Radio Systems, Inc. | File No. 31626-CL-P-108-A-84 |
| 143. Southern Cellular Radio Systems, Inc. | File No. 30973-CL-P-109-A-84 |
| 144. Southern Cellular Radio Systems, Inc. | File No. 32356-CL-P-110-A-84 |
| 145. Southern Cellular Radio Systems, Inc. | File No. 32196-CL-P-111-A-84 |
| 146. Southern Cellular Radio Systems, Inc. | File No. 32195-CL-P-112-A-84 |
| 147. Southern Cellular Radio Systems, Inc. | File No. 31315-CL-P-113-A-84 |
| 148. Southern Cellular Radio Systems, Inc. | File No. 32333-CL-P-114-A-84 |
| 149. Southern Cellular Radio Systems, Inc. | File No. 32120-CL-P-115-A-84 |
| 150. Southern Cellular Radio Systems, Inc. | File No. 32173-CL-P-117-A-84 |

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| **151. Southern Cellular Radio Systems, Inc.** | **File No. 33169-CL-P-118-A-84** |
| **152. Southern Cellular Radio Systems, Inc.** | **File No. 33082-CL-P-119-A-84** |
| **153. Southern Cellular Radio Systems, Inc.** | **File No. 32046-CL-P-120-A-84** |
| **154. Tel-Share Telecommunications, Inc.** | **File No. 31352-CL-P-102-A-84** |

END

**Application, Not Acceptable for Filing**
**Mobile Radio Service, Cellular**
**Reconsideration, Petition For, Treated as Appropriate for Review**
**Rules, Failure to Conform**
**Site Availability**

Order on Reconsideration adopted regarding the return of Round IV cellular applications for failure to include site availability certifications in their applications referred to Commission in order to reach a final decision on acceptability for filing with a minimum of delay. Reconsideration granted for all 12 applications because the applicants presented documentation satisfying the Commission's requirements for granting reconsideration.
—*American Cellular Corp.*

FCC 86-38

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re

Petitions for Reconsideration of the
Return of Round IV Cellular Applications
for Lack of Site Availability Certification

### ORDER ON RECONSIDERATION

Adopted January 17, 1986; Released January 24, 1986

BY THE COMMISSION:

1. Various Round IV cellular applicants seek reconsideration of the actions of the Chief, Mobile Services Division, returning their applications as unacceptable for filing for failure to provide reasonable assurance of site availability, as required by Section 22.15(a)(1) of the Commission's Rules. Since a common issue is presented, all the applications listed in the Attachment has been consolidated for reconsideration. The petitions have been referred

to the Commission under Section 1.106(a)(1) of the Rules in Order to expedite a final decision on the matters raised.

### *Discussion*

2. In our revision and update of Part 22 of the Rules, *Public Mobile Radio Services*, 95 FCC 2d 769 (1983), we eliminated the requirement that applications include evidence of site availability. Instead, we required certification in the application. We explicity stated: "This certification will apply to all applications filed after the effective date of this order, including cellular applications." The revised Form 401, which was attached to the decision, included a certification block. 95 FCC 2d at 778-79.

3. When it became apparent that the revised Form 401 would not be available in time for use by Round IV cellular applicants, the Common Carrier Bureau (Bureau) issued Public Notice, Report No. CL-69, May 17, 1984, which stated that Round IV cellular applicants should use the existing Form 401 and should answer every item relating to both the general application requirements and the specific application requirements relating to cellular. In response to numerous requests for additional guidance, the Bureau issued Public Notice, Report No. CL-75, June 6, 1984, which advised that item 45 on existing Form 401, which required the submission of site availability letters or contracts, need not be completed, but also stated that all information required by the revised Form 401 must be submitted. Many Round IV applicants neither responded to item 45 nor certified that they have reasonable assurance of the availability of their proposed sites. These applicants received letters rejecting their applications.

4. A large number of these applicants requested the Bureau to reinstate their applications because of the widespread misapprehension concerning the site availability certification requirement caused by Public Notice CL-75. In response, the Bureau issued Public Notice, Report No. CL-304, April 26, 1985. It was there reiterated that Section 22.13(a)(1) required Round IV applicants to submit all information "required by the Commission's . . . application forms", including all information required by revised Form 401, a draft of which had been published. It was further stated that the pre-screening policy requiring a site availability certification would not be modified in view of the explicit direction in Public Notice CL-75 to submit all information required by the revised Form 401 and the declaration in our decision revising Part 22 that all subsequently filed applications must include a site availability certification. However, because of the widespread

misapprehension it was decided that Petitions for Reconsideration of returns based upon site availability would be evaluated on a case-by-case basis. Such Petitions were required to include documentation of site availability pre-dating the application filing date, as well as a statement of the reasons for omission of a certification.

5. Most of the Petitioners presented satisfactory statements explaining why they omitted a site availability certification in light of the circumstances described above. Additionally, several of the Petitioners correctly argued that their applications, in fact, contained site availability certifications which were overlooked in pre-screening. All of the Petitioners presented documentation of site availability pre-dating their application filing date. We find that all of the Petitioners have satisfied the requirements of Public Notice CL-304. Accordingly, we will grant reconsideration and reinstate all of the applications listed in the Attachment. *See GTE Mobilnet Incorporated*, Mimeo No. 4544, released May 14, 1985, and *Matelco Systems, Inc. et al.*, Mimeo No. 6369, released August 15, 1985.

## *ORDERING PARAGRAPHS*

6. Accordingly, IT IS ORDERED, that the Petitions for Reconsideration filed respecting the applications listed in the Attachment ARE GRANTED, and the listed applications ARE REINSTATED and accepted for filing.

7. A copy of this order will be mailed to the Attorney of Record or to the Contact Representative designated in each of the involved Petitions for Reconsideration.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

## *Attachment*

### APPLICATIONS ASSOCIATED WITH THIS ORDER

| | |
|---|---|
| 1. American Cellular Corp. d/b/a ACC of Beaumont-Pt Arthur, TX | File No. 35129-CL-P-101-A-84 |
| 2. American Cellular Corp. d/b/a ACC of Saginaw-B-City-Midland | File No. 35131-CL-P-094-A-84 |
| 3. Butler-Mather Partners | File No. 34473-CL-P-096-A-84 |
| 4. Cedar Hill Farm Corp. | File No. 34382-CL-P-096-A-84 |
| 5. Cellular Advanced Radiophone Systems, Inc. d/b/a CARS | File No. 30638-CL-P-096-A-84 |
| 6. Dr. Jarvis Mobley | File No. 31659-CL-P-108-A-84 |

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| **7. Hampton Roads Cellular Telephone Corp.** | **File No. 34090-CL-P-104-A-84** |
| **8. James H. Cobb, III** | **File No. 31272-CL-P-108-A-84** |
| **9. Jerry Agam d/b/a Pacific Funding** | **File No. 31670-CL-P-107-A-84** |
| **10. Telpage-Resource Holdings, Inc.** | **File No. 31003-CL-P-095-A-84** |
| **11. The Cellular Connection, Inc.** | **File No. 32914-CL-P-117-A-84** |
| **12. Warren K. Wells** | **File No. 31273-CL-P-108-A-84** |

**Application, Amendment of, Right to File**
**Application, Not Acceptable for Filing**
**Circumstances, Change in, Substantial or Significant**
**Financial Qualifications, Availability of Funds**
**Mobile Radio Service, Cellular**
**Rules, Failure to Conform**

**Order on Reconsideration adopted regarding the return of Round IV Cellular applications for failure to demonstrate availability of sufficient net liquid assets to satisfy estimated system costs referred to Commission in order to reach a final decision on acceptability for filing with a minimum of delay. Pre-lottery amendments to correct defects not allowed. Reconsideration denied concerning 211 applications which were properly returned for failure to satisfy the Commission's established and properly noticed requirements for demonstrating that specific types of assets qualify as liquid. Reconsideration granted for four applications because of staff errors in failing to credit certain assets that met the net liquid assets requirements and in failing to analyze multiple market total costs in accordance with applications actually filed. —*American Cellular Corp.***

FCC 86-46

## BEFORE THE
## FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re

Petitions for Reconsideration of the
Return of Round IV Cellular Applications
for Failure to Demonstrate Availability of
Sufficient Net Liquid Assets

### ORDER ON RECONSIDERATION

Adopted January 17, 1986; Released January 24, 1986

BY THE COMMISSION:

1. Various Round IV cellular applicants seek reconsideration of

the actions of the Chief, Mobile Services Division, returning their applications as unacceptable for filing. The petitions have been referred to the Commission under Section 1.106(a)(1) in order to expedite the resolution of the matters raised. The primary reason for return of the applications listed in the Attachment was the failure of tendered financial statements to demonstrate sufficient net liquid assets to provide a reasonable assurance that the funds needed to construct the proposed system and operate it for one year would be available. Accordingly, the listed applications have been consolidated for reconsideration.

## *Discussion*

### *A. Demonstration of Financial Ability Is a Basic Qualifications Requirement*

2. From the inception of the Commission's licensing of cellular systems, one of the basic qualifications requirements has been that applicants must demonstrate that they are financially qualified. In *Cellular Communications Systems,* 86 FCC 2d 469, 501 (1981) (*Report and Order*), we stated that: "Cellular applicants must demonstrate that they are financially qualified to construct their proposed facility and to operate it for a reasonable period of time." With regard to financial ability, the prevailing standard is one of "reasonable assurance" that the funds needed to construct the proposed system and operate it for one year would be available. *Advanced Mobile Phone Service, Inc.,* 91 FCC 2d 512, 516–17 (1982) (*Chicago Designation Order*).

3. When the Commission proposed to adopt a lottery selection process for cellular applications, we stated:

> In order for applications to be included in the lottery, they will have to be acceptable for filing under our cellular rules. We will not permit applicants to meet our strict standards by means of later-filed amendments. (Footnote omitted).

Notice of Proposed Rulemaking, 48 Fed. Reg. 51493, 51495, November 9, 1983. In *Cellular Lottery Rulemaking,* 98 FCC 2d 175 (1984) (*Lottery Order*), we reiterated that "Applicants must show financial ability (Section 22.917) . . . before their applications will be accepted for filing." *Lottery Order, supra,* at 213. The Commission also amended Section 22.918(b) to prohibit the filing of any amendments to fourth round cellular applications prior to lottery, stating "cellular applicants should by this time be able to file complete and accurate applications . . . . " *Lottery Order, supra,* at 220. Finally, we notified cellular applicants that "The staff will carefully pre-screen the cellular applications to ensure that deficient applications are not included in the lottery." *Lottery Order, supra,* at 185. Thus, fourth round cellular applicants were on notice that the reasonable assurance standard of financial ability would be applied in determining the acceptability of fourth round applications, and that applicants could not cure any defects, however minor, in order to gain entrance to the lottery.

### *B. The Net Liquid Assets Standard*

4. All of the applicants listed in the Attachment hereto relied upon a balance sheet or other financial statement to demonstrate the availability of some or all of the funds necessary to cover their proposed construction and first year operating costs. In analyzing financial statements, "The long-standing Commission standard . . . is not current assets but net liquid assets, that is, the excess of current assets over current liabilities." *Chicago Designation Order, supra,* at 516. *Accord, GTE Mobilnet of San Jose, Inc.,* 54 RR 2d 321 (1983) (*San Jose Designation Order*); *Advanced Mobile Phone Service, Inc.,* 54 RR 2d 531 (1983) (*Kansas City Designation Order*); *Advanced Mobile Phone Service, Inc.,* 54 RR 2d 260 (1983) (*Miami Designation Order*); and *Celcom Communications Corp. of Georgia,* 52 RR 2d 1674 (1983) (*Atlanta Designation Order*). The *Atlanta Designation Order* further expounded on the net liquid assets standard, stating: "Net liquid assets are the excess of current assets readily converted to cash over current liabilities." *Atlanta Designation Order, supra,* at fn. 8. In order to demonstrate ready convertibility into cash, the identity, liquidity and value of listed assets must be demonstrated. "A listing of 'other current assets' cannot be given any credit, since it is impossible to determine the identity, liquidity or value of such assets." *Miami Designation Order, supra,* at 283. Finally, "reliance can be placed on non-liquid assets if the marketability of those assets is documented." *LIN Cellular Communications Corp.,* 53 RR 2d 419, 424 (1983) (*Los Angeles Designation Order*).

5. In addition to establishing the net liquid assets standard, the designation orders for the top-30 cellular markets, and other Commission precedent therein cited, also established a variety of requirements for demonstrating that specific types of assets qualify as liquid assets. An analysis of the established requirements for some of the commonly claimed assets follows.

a. *Cash and Cash Equivalents.* Cash and short term certificates of deposit are liquid assets. *San Jose Designation Order, supra,* at 325 and fn. 2. "In order to determine the liquidity and value of short-term investments they should be identified by the type of investment, name of issues, name of the market or exchange on which they are traded (if any), and their current market value." *Miami Designation Order, supra,* at fn. 66. Some credit can be given to an unidentified listing of $3.75 million in "temporary cash investments" where there is evidence that the funds are invested on a short-term basis and only a relatively small percentage of the funds are needed to cover estimated costs. *Advanced Mobile Phone Service, Inc.,* 54 RR 2d 185, 205 (1983) (*Houston Designation Order*). However, no credit can be given for a combined listing for "cash and short-term investments" since we are "unable to determine how readily these short-term investments can be converted into cash or what portion of the $19.2 million figure is cash rather than short-term investments." *Kansas City Designation Order, supra,* at 543.

b. *Marketable Securities.* "In order to determine the liquidity and value of marketable securities, they should be identified by the type of security, name of issues, and the name of the market or exchange on which traded and their current market value." *Kansas City Designation Order, supra,* at fn. 21; *Advanced Mobile Phone Service, Inc.,* 53 RR 2d 349, fn. 21 (1983) (*New York Designation Order*). No credit need be given to a simple listing of "marketable securities." *Kansas City Designation Order, supra,* at 543; *New York Designation Order, supra,* at 360.

c. *Real Estate.* Evidence must be submitted to establish the fair market value of nonliquid assets such as real estate. *Chicago Land TV Co.,* 11 FCC 2d 96, 104 (1967). Precedent also establishes that two-thirds of the appraised value of real estate may be credited in a net liquid asset analysis if the marketability of such real estate is documented. *Dodge-Point Broadcasting Co.,* 13 RR 2d 274 (1968); *Enterprise Broadcasting, Inc., et al.,* 56 FCC 2d 352, 354-55 (1975); *Los Angeles Designation Order, supra,* at 424-425; and *GTE Mobilnet of Cleveland, Inc.,* 54 RR 2d 1410, 1413 (1983) (*Cleveland Designation Order*).

d. *Mortgages Held.* A mortgage loan portfolio may be credited where the mortgaged property is described, the loan maturities are disclosed, and there is evidence, such as the opinion of a mortgage loan trader, that the mortgages held are readily marketable. *Los Angeles Designation Order, supra,* at 424-425.

e. *Business Ownership Interests.* In order to be credited, a listed asset encompassing an ownership interest in a business must be demonstrated to be readily marketable and liquid. *Julie P. Miner,* 52 FCC 2d 684, 685 (1975); *Cleveland Designation Order, supra,* at 1413. A listing for film contract rights, without more, will not be credited. *New York Designation Order, supra,* at 360.

f. *Projected Revenues From Proposed Cellular Operations.* Despite the fact that some applicants provided detailed revenue projections explaining both the methodology and assumptions employed, no projected revenues estimates were credited in the designation orders for the top-30 cellular markets. *See New York Designation Order, supra,* at 360; *Kansas City Designation Order, supra,* at 544; and *Advanced Mobile Phone Service, Inc.,* Mimeo No. 6154, released August 26, 1983 (*Dallas Designation Order*), at paragraph 5.

g. *Capital Subscriptions.* Capital subscriptions which are unpaid can not be credited. *San Jose Designation Order, supra,* at 325.

h. *Business Balance Sheet Assets.*

(i) *Accounts Receivable.* In general, seventy-five percent of properly aged accounts receivable may be credited toward net liquid assets. *Kaiser Broadcasting,* 62 FCC 2d 246 (1977); *Atlanta Designation order, supra,* at 1678; *Kansas City Designation order, supra,* at 543; *New York Deisgnation Order, supra,* at fn. 20. If evidence is presented to demonstrate an historically higher percentage of collectability, such higher percentage can be credited. *American Mobile Communications of Washington and Oregon,* 52 RR 2d 1520, at fn. 10 (1983) (*Seattle Designation Order*). If no information is provided as to collectability, no credit can be given. *Kansas City Designation Order, supra,* at 543.

(ii) *Future Cash Flow.* Future cash flow is too speculative to be credited. *Atlanta Designation Order, supra,* at 1678; *New York Designation Order, supra,* at 360.

(iii) *Other Assets.* "Prepaid Expenses" can be credited. *Miami Designation Order, supra,* at 282–283. Seventy-five percent of premiums receivable can be credited. *Id.*

6. Finally, when a party shows ownership of nonliquid assets which are vastly in excess of the amount committed to an applicant, a detailed showing of net liquid assets is not required. *See United Artists Broadcasting, Inc.,* 4 RR 2d 453 (1964); *International Broadcasting Co.,* 3 FCC 2d 449 (1966); *Enterprise Broadcasting Inc., et al.,* 56 FCC 2d 352 (1975); *Alexander City Broadcasting, Inc., et al.,* 55 FCC 2d 521 (1975); *Radio Dispatch Corporation, et al.,* 61 FCC 2d 425 (1976); *Tel-Page Corp. of Wisconsin,* 74 FCC 2d 370 (1979); and *Cornwall Broadcasting Corp.,* 51 RR 2d 389 (1982). These cases compared the current assets, total assets, and net income of corporate guarantors, or the net worth or equity in a specific asset of individual guarantors, with the amount of money committed to the applicant. The ratio of the total assets value to the amount of money committed ranged from a low of 16 to 1 in the *Cornwall* case to a high of 148 to 1 in the *United Artists* case. This line of precedent has also been dealt with specifically in the cellular context in the *San Jose*

*Designation Order.* In San Jose, McCaw Communication Companies, Inc. (MCC), a corporate parent of the applicant McCaw Communications of San Jose, Inc. (McCaw), pledged a $5 million equity contribution. MCC's balance sheet showed net liquid assets of only $912,376, and total assets of $23 million. McCaw argued that the $23 million total assets was sufficient to demonstrate the availability of the $5 million commitment under the *Tel-Page* and *Radio Dispatch* cases. This argument was rejected by the Bureau which stated (*San Jose Designation Order, supra,* at 324–325):

> In our view, however, the net liquid assets standard must be applied to cellular applications based on the [*Chicago Designation Order*], where the Commission explicitly adopted it. The MCC balance sheet shows total assets of $23 million. There is no way to determine how much of the total is easily converted to cash or how much of the total may already be committed to other projects or liabilities of the firm. We conclude, therefore, that only $912,000 in net liquid assets has been shown to be available from MCC.

7. In *Cellular Communications of Cincinnati, Inc.*, 53 RR 2d 827, 829–830 (1983) (*Cincinnati Designation Order*), it was held that two pools of capital held by venture capital firms totalling $28,650,000 was sufficient under the *Tel-Page* case to demonstrate the availability of sufficient equity funding to cover a commitment of $1,968,000 to the applicant. Thus, while a demonstration of total net assets in excess of 14 times the amount of the commitment is sufficient to dispense with the net liquid assets requirement (as was the case in Cincinnati), a demonstration of total assets which is less than 5 times the amount of the commitment is not sufficient.

8. Having outlined the Commission's net liquid assets requirements, as detailed above, we turn to consideration of the Petitions for Reconsideration respecting the applications listed in the Attachment hereto.

### *C. Beaumont-Port Arthur, TX and Corpus Christi, TX Applicants*

9. Joint Petitions for Reconsideration were filed on behalf of 69 applicants, each of which filed non-wireline applications for both the Beaumont-Port Arthur, Texas[1] and Corpus Christi, Texas[2]

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[1] Application numbers 7, 9, 11, 13, 15, 17, 19, 20, 25, 27, 31, 34, 36, 40, 42, 45, 49, 51, 53, 55, 59, 62, 64, 66, 77, 80, 81, 83, 88, 90, 91, 93, 95, 100, 102, 105, 107, 109, 111, 113, 116, 118, 119, 122, 127, 130, 133, 135, 138, 144, 148, 150, 153, 156, 157, 159, 161, 164, 178, 180, 182, 188, 195, 197, 199, 206, 210, 212, and 214 in the Attachment.

[2] Application numbers 6, 8, 10, 12, 14, 16, 18, 21, 24, 26, 32, 33, 37, 41, 43, 46, 50, 52, 54, 56, 60, 63, 65, 67, 78, 79, 82, 84, 87, 89, 92, 94, 96, 101, 103, 106,

cellular markets. Each of the Beaumont applicants was part of a pre-filing agreement with Port City Cellular Communications, another Beaumont non-wireline applicant, and each of the Corpus Christi applicants was part of a pre-filing agreement with Corpus Christi Cellular Communications, another Corpus Christi non-wireline applicant. The existence of the pre-filing agreement, the identity of the surviving applicant, and the ultimate ownership interests in the surviving applicant were all disclosed in the applications.

10. The construction and first year operating costs (less depreciation) for the identical cellular systems proposed by each Beaumont applicant totalled $6,156,000. Each of the applications projects first year revenues of $1,144,000 which, when subtracted from the total costs, results in a "*net* cumulative funds requirement" of $5,012,000. The construction and first year operating costs (less depreciation) for the Corpus Christi applications totaled $6,463,000. Each of the applicants projects first year revenues of $1,209,000, resulting in a *net* cumulative funds requirements of $5,254,000.

11. To demonstrate the availability of funding, each applicant relies on: 1) a letter from the First National Bank of Bellaire expressing the bank's willingness to lend "up to Five Million Dollars"; 2) a $1,500,000 loan commitment from Saccone & Associates, backed by a balance sheet for Frank H. Saccone; and 3) a balance sheet of the applicant. The Mobile Services Division returned the involved Corpus Christi and Beaumont applications, stating that the applications were unacceptable for filing because:

> Financial showing relies on funds committed to cellular applications in other markets. [Rule 22.917(b)].
>
> Balance sheet relied upon by applicant lacks sufficient detail to demonstrate availability of funding for construction and operation of system for one year. [Rule 22.917(c)].
>
> Applicant has not demonstrated availability of funding for construction and operation of system for one year. [Rule 22.917(a)].

Letters dated August 26 and 28, 1985.

12. Petitioners argue that their bank letters are market-specific and comply in all respects with Section 22.917(b) of the Commission's Rules. They also argue that the Saccone letter is market-

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108, 110, 112, 114, 115, 117, 120, 123, 128, 131, 134, 136, 139, 145, 149, 151, 152, 155, 158, 160, 162, 163, 179, 181, 183, 189, 194, 196, 198, 207, 211, 213, and 215 in the Attachment.

specific, and that Mr. Saccone's balance sheet shows net current assets of at least $6 million, double the $3 million aggregate commitment made by Mr. Saccone to the Corpus Christi and Beaumont applicants. Petitioners assert that such a single funding showing covering the aggregate total costs of two markets is entirely appropriate. Finally, Petitioners argue that the modification of pre-screening policy announced in Public Notice, Report No. CL-304, released April 26, 1985, requires the Commission to employ a "substantially complete" acceptability standard across the board to Round IV cellular applicants in order to avoid the uneven treatment of applicants condemned by the Court in *Green Country Mobilephone, Inc., v. Federal Communications Commission,* 765 F. 2d 235 (D.C. Cir. 1985). Petitioners assert that they have gotten less favorable treatment because they have entered pre-filing agreements.

13. The Petitioners rely on projected revenues to reduce the construction and operational costs totals for each market. However, as detailed in paragraph 5(f) above, cellular applicants are not permitted to rely upon even detailed projections of revenues to demonstrate the availability of sufficient funds to cover construction and operational costs. Furthermore, the revenue projections in the applications involved here are entirely unsupported by detail regarding the methodology and assumptions employed. Thus, the Petitioners cannot be given credit for projected revenues in analyzing their demonstrations of financial ability. Accordingly, the Beaumont applicants must demonstrate sufficient funding to cover costs of $6,156,000, and the Corpus Christi applicants must demonstrate sufficient funding to cover costs of $6,463,000.

14. The Petitioners' applications were not rejected for any defect in their bank letters. The bank letters identify the applicant, are market specific, and contain sufficient terms of the proposed loan to satisfy the reasonable assurance test of *Multi-State Communications, Inc. v. FCC,* 590 F. 2d 1117 (D.C. Cir. 1978), *cert. denied,* 440 U.S. 959 (1979) (*Multi-State*). Thus, the Petitioners have established the availability of $5 million for each market.

15. Saccone & Associates makes a commitment to loan up to $1.5 million to each of the Petitioners in both the Beaumont and Corpus Christi markets. Section 22.917(b) of the Commission's Rules provides that:

> Resources used to demonstrate an applicant's financial ability . . . cannot include funds committed to another project, or committed in another cellular application.

Since there can be only one winner per market, and consequently only one loan to be made, we have interpreted Section 22.917(b) as permitting the commitment of the same funds to multiple applicants for the same MSA market. The rule, however, clearly prohibits the commitment of the same funds to applicants in different MSA markets. As stated in the *San Jose Designation Order*, *supra*, at 332:

> This rule was intended to prohibit double commitment of the same funds, not to prohibit applicants from obtaining one financing package to cover all cellular ventures.

Where a cellular applicant relies on a single source of funds to demonstrate its ability to finance applications in more than one market, the total funds available must be sufficient to cover the total of the costs for all involved markets. *See Chicago Designation Order*, *supra*, at 515. Since each of the Petitioners relies upon Saccone & Associates for loans totaling up to $3 million, we will examine the ability of Saccone & Associates to meet such commitments.

16. The balance sheet for Frank H. Saccone states that "current Assets Exceed Short Term Liabilities By More Than . . . $6,000,000." The balance sheet also indicates that total assets exceed $12,000,000, and that Mr. Saccone's net worth also exceeds $12,000,000. It is readily apparent that Mr. Saccone's balance sheet meets none of the net liquid assets requirements detailed in paragraph 5 above. Since it is impossible to determine the identity, liquidity or value of Mr. Saccone's assets, we cannot credit the Saccone balance sheet for demonstrating any net liquid assets.[3] *See Miami Designation Order*, *supra*, at 283. The balance sheets of the individual applicants demonstrate a minimal level of capitalization, and are subject to the same detail deficiencies as the Saccone balance sheet. Thus, we can credit no net liquid assets based on the applicants' balance sheets.

17. The Petitioners have demonstrated the availability of $5 million for each market which is insufficient to cover the total costs in either market. We further conclude that Petitioners' reliance on the *Tel-Page* case is misplaced under the circumstances presented. Mr. Saccone's claimed current assets of $6

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[3] A Section 22.917(b) violation was cited in the return letters because Saccone & Associates had failed to demonstrate the availability of sufficient funds to cover its total commitment in the two markets.

million is only two times his $3 million commitment, and the claimed net worth of $12 million is only four times the total commitment.[4] We find such a showing to be governed by the *San Jose Designation Order*, *supra*, at 324–325, where a marginally larger multiple was found to be insufficient under the *Tel-Page* case. Accordingly, we conclude that the Petitioners have failed to demonstrate their financial qualifications in both the Beaumont and Corpus Christi markets, and that the return of their applications as unacceptable for filing was correct.

18. Finally, we reject the Petitioners' contentions that their applications were rejected because they had entered pre-filing agreements, and that the Petitioners have not been equally treated in violation of *Green Country*, *supra*. The pre-filing agreements were not cited in the return letters as a reason for return of the Petitioner's applications, and, as demonstrated above, the applications were properly returned for financial reasons. The Public Notice cited by Petitioners was issued because of widespread confusion among applicants regarding certain application requirements as a result of changes in the application forms and site availability showings, as well as a rule that had never received a definitive interpretation. However, as documented above, the applicability of the net liquid assets standard to cellular applications was clearly established in the designation orders for the top-30 cellular markets and the criteria for the application of that standard were established in numerous Commission and Bureau decisions. The Petitioners' failure to comply with well established Commission requirements can not be lightly excused. The *Green Country* decision is inapplicable because the Petitioners are simply not in a position comparable to that of the applicants affected by Public Notice CL–304. Based on the above, we conclude that the joint Petitions for Reconsideration filed by the Beaumont and Corpus Christi applicants have no merit, and they will be denied.

### D. American Cellular Corporation

19. Three Petitions for Reconsideration were filed by American Cellular Corporation (ACC)[5] respecting the return of its applications for the Colorado Springs, Colorado, Reading, Pennsylvania

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[4] Even limiting Mr. Saccone's commitment to the $2,619,000 in funds actually needed by the Petitioners to cover their costs only marginally improves the multiples.

[5] American Cellular Corporation does business under different names in each market, but, for ease of reference, will be referred to as ACC.

and Huntsville, Alabama cellular markets.[6] All three Petitions present the same financial qualifications issue, while the Colorado Springs Petition also includes a site availability issue.[7]

20. Exhibit 9, Attachment A, in ACC's applications indicates that ACC filed applications for nineteen Round IV cellular markets, and that the construction and first year operating costs for all of ACC's applications totalled $56,546,623. To demonstrate the availability of sufficient funds to cover its total costs, ACC relies upon: (1) a letter from First National Bank of Minneapolis agreeing to extend credit to ACC "up to the amount of $47,500,000;" (2) a letter from Michael E. Marcovsky agreeing "to lend or act as either guarantor or co-signatory, an amount up to $4 million", backed by Mr. Marcovsky's Financial Statement; and (3) the balance sheet of ACC. Pre-screening of ACC's applications resulted in a staff determination that ACC had reasonable assurance of the $47.5 million bank loan, $255,000 in net liquid assets credited from Mr. Marcovsky's financial statement, and $583,217 in cash and cash equivalents from ACC's balance sheet. The staff totalled the costs for the markets in numerical order, and the total available funds, $48,338,217, was sufficient to cover ACC's estimated costs through sixteen markets. Accordingly, by letters dated August 29, 1985 and September 11, 1985, ACC's Reading, Huntsville and Colorado Springs applications (those for ACC's highest three numerical markets) were returned as unacceptable for filing for failure to demonstrate the availability of sufficient funds to cover the estimated costs of these proposed cellular systems.

21. In its Petitions, ACC states that its total cost exhibit was in error because ACC did not file an application for the San Juan cellular market. Furthermore, ACC's Utica-Rome, New York application was returned because of an impermissible extension of its 39 dBu contours into the Syracuse MSA without sufficient engineering justification, and ACC did not seek reconsideration of the return of its Utica-Rome application. ACC argues that its total costs must be reduced by $7,450,234, the total of the estimated costs for San Juan and Utica-Rome, resulting in a $49,096,389 total cost figure. After such cost reductions, ACC's total available funds of $48,338,217 is sufficient to cover the

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[6] Application numbers 2, 3, and 4 on the Attachment.

[7] We initially find that ACC has satisfied the requirements of Public Notice, Report No. CL-304, by including documentation of site availability pre-dating the filing and a statement of the reasons for omission of a site availability certification in its Colorado Springs application. Accordingly, we will grant ACC's Colorado Springs' Petition to eliminate the site availability issue.

estimated costs for Colorado Springs and Reading, but there is still a $758,172 shortfall of funds respecting ACC's Huntsville application. ACC argues that the Huntsville application should also be accepted under *Tel-Page*, *supra*, because of Mr. Marcovsky's net worth of over $9 million, and the "relative insignificance of the short-fall ($758,172)."

22. We believe that ACC has presented evidence which warrants the acceptance of its Colorado Springs and Reading applications, but not its Huntsville application. The staff's financial analysis of ACC's financing was based on a mistake of fact that ACC required $4,518,129 to cover estimated costs for a San Juan application that ACC did not, in fact, file, despite its mention in the financial exhibit. We will reduce ACC's total costs to $52,028,494, the total costs for all applications ACC actually filed. We also believe that ACC's total costs should be further reduced by the cost of the rejected Utica-Rome application which ACC is no longer prosecuting. Such a reduction reflects the actual circumstances existing at the time of the original staff determination and is consistent with the previous reduction of total funds needed to reflect a smaller total financial commitment resulting from a post-filing settlement agreement. *See Cincinnati Designation Order*, *supra*, at fn. 14. Thus ACC's total costs will be reduced to $49,096,389.

23. We find that ACC has demonstrated the availability of $48,083,217. The staff erred in crediting $255,000 in net liquid assets from Mr. Marcovsky's financial statement. *See* para. 28, *infra*. We further find that ACC's demonstration of $48,083,217 in available funds is sufficient to cover the estimated costs of the Colorado Springs and Reading applications. Accordingly, we will reinstate ACC's Colorado Springs and Reading[8] applications.

24. We will not reinstate ACC's Huntsville application for a number of reasons. First, ACC's Huntsville Petition was late-filed[9] and must be rejected. Unlike the Reading situation, ACC's Huntsville application would not have been accepted but for the mistake of fact in including the San Juan costs. In fact, even the

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[8] ACC's Reading Petition for Reconsideration was filed on September 30, 1985, while the filing deadline for Reading petitions expired on September 23, 1985. Thus, ACC's Reading Petition was late-filed and must be rejected. We are reinstating ACC's Reading application on our own motion because ACC's total available funds would have been sufficient to cover ACC's Reading application but for the mistake of fact in including the estimated costs for the San Juan application that was not filed.

[9] ACC's Huntsville Petition was filed on September 30, 1985, while the filing deadline for Huntsville petitions expired on September 16, 1985.

further reduction of total costs resulting from the dismissal of ACC's Utica-Rome application leaves ACC's total available funds $758,122 short of covering the costs of the Huntsville application. Under such circumstances, there is no basis for acting on our own motion. Accordingly, ACC's Huntsville Petition is rejected as late-filed, and we need not decide ACC's remaining arguments.

### *E. Bakersfield Applicants*

25. Twenty-five non-wireline applicants for the Bakersfield, California cellular market[10] filed identical Petitions for Reconsideration of the return of their applications. An opposition was filed on behalf of the clients of Fisher, Wayland, Cooper and Leader who filed non-wireless applications for the Bakersfield market.

26. The construction and first year operating costs for the identical cellular systems proposed by each involved Bakersfield applicant totalled $3,838,264. To demonstrate the availability of funding, each applicant relies on: (1) a letter from Michael E. Marcovsky agreeing "to lend or act as either guarantor or co-signatory, an amount up to $4 million", backed by Mr. Marcovsky's Financial Statement; and (2) a balance sheet for the applicants. Mr. Marcovsky's financial statement was identical to that submitted in the ACC applications dealt with in the preceding section where it was determined that only $255,000 in net liquid assets could be credited. The pre-screening process disclosed that the involved group of 25 applicants filed applications in a total of 19 markets, and that all of these applications contained identical $4 million commitments from Mr. Marcovsky. Since Mr. Marcovsky's financial statement did not demonstrate the availability of net liquid assets sufficient to satisfy any of his $4 million commitments, the applications filed by the group in all 19 markets were returned as unacceptable for filing.

27. In their Bakersfield Petitions, the applicants state that they do not intend to prosecute further their applications for markets other than Bakersfield, and that, consequently, their financial showings "must be viewed only in the context of Bakersfield". The applicants argue that Mr. Marcovsky's net worth of $9,240,000 is sufficient to demonstrate his ability to meet a loan commitment of $4 million, so the Bakersfield applications should be reinstated. The opposition argues that the applicable standard is net liquid assets, and that there has been no demonstration of financial qualification because the "liquidity of the various assets

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[10] Application numbers 1, 5, 28, 29, 30, 44, 57, 58, 61, 86, 104, 121, 124, 125, 126, 129, 132, 137, 146, 147, 154, 184, 185, 200, and 209 in the Attachment.

shown on Mr. Marcovsky's balance sheet has not been demonstrated."

28. We agree with the opposition, and we will deny the Petitions. Our analysis of Mr. Marcovsky's financial statement indicates that the staff was generous in crediting net liquid assets of $255,000. The staff credited $320,000 for "cash, bonds, notes receivable" and subtracted liabilities totalling $65,000. However, no credit should be given for the $320,000 combined asset entry. *See Kansas City Designation Order*, *supra*, at 543. No credit can be given for the various other assets listed since the value and liquidity of such assets was not adequately demonstrated as required by the net liquid assets standard.[11] Accordingly, we affirm the decision that the Marcovsky financial statement does not demonstrate the availability of net liquid assets sufficient to cover a $4 million commitment. Furthermore, a showing of net worth of less than three times the amount of a commitment is insufficient to dispense with the net liquid assets requirements. *See Tel-Page*, *supra*, and *San Jose Designation Order*, *supra*, at 324-325. The Petitions of the 25 Bakersfield applicants lack merit, and they will be denied.

### *F. Peoria and Huntington Applicants*

29. Joint Petitions for Reconsideration were filed on behalf of a group of 18 applicants, 17 of which each filed non-wireline applications for both the Huntington-Ashland, West Virginia-Kentucky-Ohio[12] and Peoria, Illinois[13] cellular markets.

30. The construction and first year operating costs for the identical cellular systems proposed totalled $5.873 million for the Huntington applications and $5.756 million for the Peoria applications. Each applicant subtracted projected revenues which resulted in *net* cumulative funds requirements of $4.952 million for Huntington and $5.019 million for Peoria. To demonstrate the availability of funds, each of the 17 common applicants submitted a letter from Thomas R. DiBenedetto and John H. Pinto, Jr. agreeing to make up to $6 million available to the applicant,

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[11] Mr. Marcovsky's financial statement satisfied none of the net liquid assets requirements respecting securities, real estate and business ownership interests detailed in paragraph 5 above.

[12] Application numbers 39, 48, 70, 72, 74, 76, 99, 141, 143, 166, 175, 177, 187, 191, 193, 203, and 205 in the Attachment. The non-common application for Huntington is number 201 in the Attachment.

[13] Application numbers 38, 47, 69, 71, 73, 75, 98, 140, 142, 165, 174, 176, 186, 190, 192, 202, and 204 in the Attachment. The non-common application for Peoria is number 97 in the Attachment.

backed by Financial Statements for both DiBenedetto and Pinto. The two non-common applicants, Tri-State Cellular Communications and Illinois River Mobile Telephone System, presented a somewhat more detailed demonstration of projected revenues and a letter from Olympic Communications, whose sole stockholders, Messrs. DiBenedetto and Pinto, committed up to $6 million to each applicant, again backed by the Financial Statements of DiBenedetto and Pinto. Pre-screening analysis of the financial statements credited $70,739 in net liquid assets to Mr. Pinto and no net liquid assets to Mr. DiBenedetto. Accordingly, by letters dated August 26 and 27, 1985, the Huntington and Peoria applications were returned as unacceptable for filing.

31. In their joint pleadings, the Petitioners assert that Section 22.917(b) does not prohibit the use of a single financial showing to cover the estimated costs for multiple cellular applications, so long as there are sufficient funds available to cover the total of the costs for each such application. Petitioners assert that the DiBenedetto and Pinto financial statements show a combined net worth of over $14.2 million which is more than sufficient to cover the combined costs totalling $11.63 million. Furthermore, the 15-1 assets to liabilities ratio and several million dollar excess net worth assertedly are sufficient to meet even the "strictest application" of the reasonable assurance standard. Petitioner's argue that the *Green Country* decision, *supra*, requires the application of a substantial compliance standard to all Round IV cellular applicants, and attached a "clarification or supplement to the financial showing" consisting of a letter from an investment banking firm expressing the opinion that the assets of Mssrs. DiBenedetto and Pinto "could readily be used as a basis for obtaining at least $12.1 million in funds . . ."

32. We will deny the Joint Petitions for Reconsideration filed by the Huntington and Peoria applicants. The staff's analysis of the net liquid assets which can be credited to the financial statements of Messrs. DiBenedetto and Pinto was entirely correct. The financial statements do not demonstrate net liquid assets sufficient to satisfy the $12 million total commitment. Nor is the total net worth demonstrated sufficient to dispense with the net liquid assets requirements. A total net worth which exceeds $12 million in commitments by just over $2 million is clearly not sufficient to qualify under the *Tel-Page* line of precedent. See *Kansas City Designation Order*, *supra*, at 543, and paragraphs 6 and 7 above. We reject Petitioner's *Green Country* arguments for the same reasons presented in paragraph 18 above.

Finally, Petitioner's "clarification" letter must be rejected as an impermissible amendment under Section 22.918(b). See *Digital Transmission Corporation*, Mimeo No. 6705, released August 30, 1985. In sum, we conclude that the Petitioners failed to demonstrate the availability of sufficient funding under applicable Commission precedent, and that the return of their applications was correct. The Joint Petitions will be denied.

### *G. CR Communications, Inc.*

33. CR Communications, Inc. (CR) filed non-wireline cellular applications in every Round IV cellular market except San Juan. CR's applications demonstrated the availability of sufficient funds to satisfy the costs for markets 92–99, and these applications were accepted. However, CR's applications for markets 100–120 were returned as unacceptable for filing for failure to demonstrate the availability of adequate funding. CR seeks reconsideration of the return of its applications for the Peoria, Illinois MSA and for the Huntington-Ashland, West Virginia-Kentucky-Ohio MSA.[14]

34. CR's estimated costs for its Peoria application totalled $1,065,326, and the costs for its Huntington application totalled $1,094,231. To meet its Peoria costs, CR submitted two bank loan commitment letters totalling $660,000; a statement of "Ownership, Assets and Values 6/19/84" of Rosetree Partners; and the 1983 Annual Report of Trans-Industries, Inc. To meet its Huntington costs, CR submitted two bank loan commitment letters totalling $840,00 as well as the Rosetree Partners and Trans-Industries statements mentioned above. Pre-screening analysis indicated that the net liquid assets of Trans-Industries were not sufficient to meet any costs following CR's application for Market Number 99. The staff also concluded that the Rosetree Partners statement lacked sufficient detail to demonstrate the availability of any funds to cover the estimated costs. Accordingly, by letters dated August 26 and August 27, 1985, CR's Huntington and Peoria applications were returned as unacceptable for filing.

35. In its Petitions, CR argues that the Rosetree Partners statement demonstrates the existence of $851,000 in net liquid assets, which is more than sufficient to demonstrate the availability of funding to meet the total costs estimated for CR's Huntington and Peoria applications. Accordingly, CR seeks reconsideration and reinstatement of these two applications.

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[14] Application numbers 22 and 23 in the Attachment.

36. We find CR's arguments to be persuasive. The Rosetree Partners statement listed cash and a number of securities. The name of each security is provided, along with the number of shares owned and the total value of each security position as of June 19, 1984. The staff did not credit any of these securities as net liquid assets, apparently because of CR's failure to name the market or exchange on which the securities are traded. See *Kansas City Designation Order, supra,* at fn. 21. However, we believe that the detail provided is sufficient to credit CR with $851,000 in net liquid assets from the Rosetree Partners statement. This is not a situation where net liquid assets credit is sought for a general entry for "securities" or "stock" or some other non-specific listing under assets. Here, each security was separately identified and the number of shares and values were listed. We believe that such a showing is sufficient to demonstrate a reasonable assurance that $851,000 will be available to fund CR's proposed Huntington and Peoria cellular systems. Accordingly, we will grant CR's Petitions and reinstate CR's Huntington and Peoria applications.

### *H. Columbia Communications*

37. Columbia Communications (Columbia) filed applications for four Round IV cellular markets (markets 101, 109, 112 and 113). Each of the four applications contains identical financial qualifications evidence consisting of: (1) a letter from The Riggs National Bank, noting that Columbia has applied in various cellular markets and agreeing to lend "up to $1,200,000", and (2) the statement that "In addition, the partners of Columbia Communications have a combined net worth of more than $800,000, which they are willing to commit, as necessary, to the construction and operation of the proposed cellular system." Pre-screening analysis credited the $1.2 million bank loan but not the net worth statement. The construction and first year operating costs of Columbia's proposed Beaumont-Port Arthur, Texas (market 101) cellular system totalled $1,087,000. Columbia's bank loan was sufficient to cover these costs. However, the remaining $113,000 was insufficient to cover the costs for any of Columbia's three other applications. Accordingly, Columbia's applications for markets 109, 112 and 113 were returned as unacceptable for filing for failure to demonstrate the availability of sufficient funding to cover the costs of these systems. Columbia seeks reconsideration

of the return of its application for Corpus Christi (Market No. 112).[15]

38. In its Petition, Columbia challenges the Commission's interpretation of Section 22.917(b) as requiring sufficient total funds to cover the costs of all proposed systems since the chance of Columbia receiving more than one authorization is so small. Columbia argues that, even under the Commission's interpretation, Columbia's Corpus Christi application should be reinstated since the $1.2 million bank loan and $800,000 net worth of the partners cover the combined net costs of the Beaumont and Corpus Christi applications which totalled $1,936,000. Finally, Columbia challenges the return of its application for a lack of detail not specifically required by Section 22.917, and attaches copies of its partners' financial statements as of the application filing date showing a combined net worth of $1,008,000.

39. We are not persuaded by Columbia's arguments for a number of reasons. First, the Commission has consistently interpreted Section 22.917(b) as requiring sufficient funding to cover the total costs of all systems proposed. *See* paragraph 15 above. We do not believe that this requirement is in any way unreasonable. Second, the staff was correct in not crediting Columbia's statement of its partners' combined net worth of more than $800,000 as net liquid assets. Such a statement demonstrates nothing about the identity, liquidity and value of the assets of Columbia's partners. Clearly, such a statement meets none of the net liquid assets requirements detailed in paragraph 5 above. Moreover, since Columbia has improperly relied on $562,000 in unsubstantiated projected revenues[16] in asserting that its Beaumont and Corpus Christi costs total $1,936,000, even if we were to credit Columbia with the full $800,000 net worth claimed, the $2 million total would not cover the total costs for both Beaumont and Corpus Christi. Finally, there is voluminous precedent establishing the amount of detail required in financial ability demonstrations, and Columbia was clearly on notice that it would have to demonstrate its financial ability, without amendment, in order to be accepted and gain entrance to the lottery. *See* paragraphs 2 and 3 above. The financial statements submitted by Columbia are rejected as impermissible amendments under Section 22.918(b). Based on the above, we conclude that

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[15] Application number 35 in the Attachment.

[16] See paragraph 5(f) above.

Columbia's Petition has no merit, and it will be denied.

### *I. Executive Telecom*

40. Executive Telecom, Ltd. (ETL) filed applications in nineteen Round IV cellular markets. To demonstrate financial ability, each ETL application submitted a letter from Jack L. LaBonte committing "financing of up to $6 million per cellular system", backed by the Personal Financial Statements of Mr. LaBonte. Pre-screening analysis of Mr. LaBonte's financial statement credited $3,197,245 in net liquid assets consisting of $4,257,500 in liquid assets (cash, short-term investments, marketable securities, and the cash value of life insurance) less liabilities of $1,060,255. Since net liquid assets of $3,197,245 was sufficient to cover the estimated costs of only one application filed by ETL, the Shreveport application, only that one application was accepted for filing and ETL's remaining 18 applications were returned. ETL seeks reconsideration only of the return of its application for the San Juan/Caguas, Puerto Rico MSA.[17] which was returned by letter dated August 19, 1985 for the financial defect noted above as well as for "failure to provide an unreduced CGSA map, contrary to Public Notice, 'Cellular Application Filing Procedures — An Update', FCC mimeo 567, released November 1, 1982."

41. Respecting its financial showing, ETL asserts that since it is only seeking reconsideration of the return of its San Juan application its financial showing must now be analyzed to determine if ETL has demonstrated sufficient funds to cover the total costs for only its Shreveport and San Juan applications. ETL asserts that the total costs for these two applications is approximately $7.6 million, and argues that Mr. LaBonte's financial statement, which shows a net worth of $35,460,730, clearly demonstrates that Mr. LaBonte would have no difficulty in raising the required $7.6 million. Finally, ETL cited *Tel-Page, supra*, in support of its argument that proof of the liquidity of Mr. LaBonte's assets should not be required, but also offers to amend its financial showing to demonstrate the liquidity of the involved assets if permitted to do so. Respecting its map defect, ETL argues that the reproduction of the map submitted with its application did not reduce the scale of the original map copied from, so that an unreduced map was included in the application.

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[17] Application number 68 in the Attachment.

42. ETL's arguments fail to convince us that either of the cited reasons for return of its San Juan application were in error. Respecting the map defect, the Public Notice cited in ETL's San Juan return letter states:

> Section 22.903(a) of the Rules, as amended by the *Reconsideration Order*, requires that the CGSA be drawn on one or more U.S. Geological Survey maps with a scale of 1:250,000. *This map cannot be reduced in size* . . . (emphasis added).

The map included in ETL's application was a reduced copy of a Puerto Rico Government 1:240,000 scale map. No USGS 1:250,000 map of Puerto Rico is available, and the Puerto Rico Government map, unreduced, would have been acceptable as the closest to the prescribed scale. By reducing the map photographically, however, ETL submitted a map on which one inch represents 8.4 miles (scale of 1:534,000) instead of the 3.79 miles represented on the original Government map. Thus, the larger-scale map actually submitted was reduced in size to less than half the size of the original, rendering engineering calculations on the submitted map virtually impossible. The depiction of the CGSA at the proper scale is a crucial part of our cellular licensing scheme.

43. ETL's map argument appears to be that the scale of its original map was not reduced in the copying process to produce the map that was actually submitted in its San Juan application. We disagree. Scale is defined to be "The proportion that a map . . . bears to the thing that it represents." Webster's New World Dictionary, Complete Reference Edition, 1972. The scale (*i.e.*, the ratio between a distance on the map and the distance represented) of the roughly half-sized map submitted with ETL's San Juan application is not the same as the full-sized 1:240,000 scale map from which it was reproduced. Accordingly, we find that the return of ETL's San Juan application for failure to include an unreduced map was correct.

44. While we need not address ETL's financial arguments since there is an independent basis for the return of its San Juan application, there are several issues that we wish to comment upon. First, Mr. LaBonte committed $6 million to each of the applications filed by ETL in nineteen Round IV cellular markets. Mr. LaBonte's original $114 million total commitment is almost exactly three times his total net worth. It is beyond peradventure that a commitment of funds in excess of an individual's total net worth violates the prohibition of Section 22.917(b) against the

double commitment of the same funds. Under such circumstances, we believe that a violation of Section 22.917(b) could have been found respecting each application that ETL filed, and all of its applications could have been rejected. We also do not believe that *Tel-Page, supra,* supports ETL's argument that proof of the liquidity of Mr. LaBonte's assets should not be required. The financial statement shows that Mr. LaBonte has a net worth 4.6 times the $7.6 million necessary to cover the total costs of ETL's Shreveport and San Juan applications. An identical 4.6 multiple was deemed insufficient in the *San Jose Designation Order, supra,* at 324–325. If Mr. LaBonte had secured a bank loan commitment to cover his financial obligations, his financial ability would not have been questioned. However, since Mr. LaBonte chose to rely solely on his financial statement, he can not be heard to complain that the analysis of such statement under applicable Commission precedent "flies in the face of economic reality." Based on the above, we find that the Petition for Reconsideration filed by ETL lacks merit, and it will be denied.

### *J. SBC Communications Corporation*

45. SBC Communications Corporation (SBC) filed eight applications for Round IV cellular markets. To demonstrate financial ability, each application submitted the same bank commitment letter from Citicorp (USA), Inc. agreeing to lend 90 percent of the total cost for each of the eight SBC applications, a total commitment of $8,429,085. A schedule attached to the bank letter specified the amounts represented by the bank's 90 percent commitment for each involved market, and the staff credited such amounts to each involved market. Each application also contains a letter from SBC Theatre Corp., SBC's parent corporation, agreeing to lend the remaining 10 percent of the total cost for each application plus interest on the Citicorp loans, a total commitment of $2,117,333. The SBC Theatre Corp. commitment is supported by its balance sheet which shows current assets "In excess of $3,130,000", total assets "In excess of $7,130,000", current liabilities "less than $995,000", and total liabilities "less than $1,495,00". Pre-screening analysis found that no net liquid assets could be credited to SBC Theatre Corp., and it was determined that SBC Theatre Corp. had failed to demonstrate the availability of funds to cover its 10 percent of costs plus interest commitment to each SBC application. Unlike the situation where a bank agrees to loan a specific amount of money which we can then allocate to cover the costs in as many markets as possible,

the bank commitments to SBC were market specific, and we cannot alter the terms of such commitments. Accordingly, each application failed to demonstrate the availability of sufficient funds, and seven of SBC's applications were returned.[18]

46. SBC seeks reinstatement of its seven returned applications.[19] SBC argues that SBC Theatre Corp. demonstrated that it has "over two and one-half times the necessary assets to make its committed loan to SBC", and that the excess of current assets over current liabilities exceeds its loan commitment. SBC argues that it had no notice of the level of detail required in balance sheets, and that the balance sheet provided has adequate detail to demonstrate SBC's financial qualifications.

47. The fact that Section 22.917 does not specify each and every financial qualifications requirement established by the Commission is neither surprising nor is it required. We believe that paragraphs 2 through 5 above conclusively establish both the applicability of the net liquid assets standard to cellular applications and the specific requirements thereof. Since the top-30 designation orders were published in the Federal Register in addition to Pike and Fischer Radio Regulations, "they may be relied upon, used or cited as precedent by the Commission or private parties in any matter." Section 0.445(e) of the Commission Rules, 47 C.F.R. Section 0.445(e). Thus, we reject SBC's notice argument.

48. Since it is clear that the SBC Theatre Corp. balance sheet does not provide the detail required to demonstrate the identity, liquidity, and value of the assets of SBC Theatre Corp., the staff was correct in crediting no net liquid assets. Furthermore, as noted previously, a demonstration of over two and one-half times the necessary assets to meet a loan commitment is not sufficient to dispense with the net liquid assets standard under applicable precedent. *See* paragraphs 6 and 7 above. Based on the above, we conclude that SBC's Petitions have no merit, and they will be denied.

### *K. Western Systems, Inc.*

49. Western Systems, Inc. (Western) filed applications for ten Round IV cellular markets. To demonstrate financial ability, each

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[18] SBC's eighth application, that for the Stockton, California MSA, was accepted for filing. The acceptance of the Stockton application was in error because it contained the same financial defect as the other seven SBC applications. Accordingly, we have directed the staff to return SBC's Stockton application as unacceptable for filing.

[19] Application numbers 167, 168, 169, 170, 171, 172, and 173 in the Attachment.

application contained a bank commitment letter from The First National Bank of Chicago and a Consolidated Balance Sheet for Western and its subsidiaries. In eight of the markets, the amount of the bank loan commitment exceeded the estimated costs, and these eight Western applications were accepted for filing. In the remaining two markets, Las Vegas, Nevada and Vallejo/Fairfield/Napa, California, the estimated costs exceeded the bank loan commitment, by $400,177 in Las Vegas and by $106,225 in Vallejo. Pre-screening analysis of Western's balance sheet credited $214,000 in liquid assets (cash, 75 percent of accounts receivable and prepaid expenses) which was completely offset by liabilities. Thus, no net liquid assets were credited. Western's Vallejo application was returned, while its Las Vegas aplication was mistakenly accepted.[20] Western seeks reinstatement of its Vallejo application.[21]

50. Western argues that the staff ignored its balance sheet in returning the Vallejo application, and that the balance sheet shows $1,795,000 "in ready cash and liquid investments" which is more than sufficient to cover both the $400,177 that Western needs to cover its Las Vegas costs and the $106,225 that Western needs to cover its Vallejo costs. However, Western's balance sheet merely lists "Investments" of $1,784,000.[22] Since neither the identity nor liquidity of Western's investments is demonstrated, no net liquid asset credit can be given. *See* paragraphs 5(a) and (b) above. Furthermore, Western's argument completely ignores its $2,983,000 in total liabilities, the current portion of which is impossible to determine from the balance sheet. Thus, we find that the staff determination that Western has not demonstrated sufficient funding to cover the costs of its proposed Vallejo system was correct, and we will deny Western's Petition.

### *L. Graham-Ewing Properties*

51. Graham-Ewing Properties (GEP) filed an application for a non-wireline cellular system for the Fort Wayne, Indiana market.[23] To demonstrate the availability of sufficient funds to cover the $1,670,000 in estimated costs of its proposed Fort Wayne

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[20] Since Western's Las Vegas application does not demonstrate its financial qualifications, we have directed the staff to return this application as unacceptable for filing.

[21] Application number 208 in the Attachment.

[22] We must ignore the statement in Western's Petition that over $700,000 of its investments consist of Treasury Notes and Merrill Lynch Ready Assets. The presentation of such new details constitutes an impermissible amendment of Western's financial showing.

cellular system, GEP submitted a bank commitment letter from the Anthony Wayne Bank for the "principal sum of $1,250,000", and a "minimum net worth statement" listing "cash" in excess of $50,000, "securities" in excess of $1,000,000, and "notes and mortgages" not over $400,000. Pre-screening analysis determined that no net liquid assets could be credited to GEP, and that GEP had failed to supply the ownership information required by Section 22.12(a)(1) of the Commission's Rules. Accordingly, GEP's application was returned by letter dated August 8, 1985.

52. In its Petition, GEP asserts that:

> Due to an inadvertent error which occurred during the preparation of Petitioner's application, an exhibit supplying ownership information was omitted from Petitioner's application.

GEP notes that the application was signed by Mr. Harvey Graham as a "General Partner", and proceeds to supply the ownership information that was not included in its application. Regarding its financial showing, GEP argues that its minimum net worth statement "demonstrated the availability of over $665,000 in current net assets" which is sufficient to cover the $420,000 Fort Wayne costs in excess of the bank commitment. GEP acknowledges the applicability of the net liquid assets standard, but, citing *International*, *Cornwall*, and *Enterprise*, *supra*, GEP argues that its $1,065,000 in assets is sufficient to demonstrate the availability of $420,000.

53. We must reject GEP's arguments respecting both of its cited defects. Section 22.23(g)(5) of the Commission's rules generally permits amendments which correct "typographical, transcription, or similar clerical errors which are clearly demonstrated to be mistakes by reference to other parts of the application . . ." to qualify as an exception to major amendment classification. However, GEP has not referred to any other portion of its application which demonstrates that the omission of an ownership exhibit was a mistake. Thus, the evidence is not persuasive that a clerical error occurred. Moreover, even if a collation error had been demonstrated, the ownership information now supplied by GEP must be rejected as an impermissible pre-lottery amendment under Section 22.918(b). *See Digital Transmission Corporation*, *supra*.

54. We also affirm the staff determination that GEP cannot be credited with any net liquid assets from its minimum net worth statement. Neither the "Real property" nor the "securities" entries provide sufficient details to be credited. *See* paragraphs

5(b) and (c) above. The "cash" entry of $50,000 is more than offset by the "notes and mortgages" liabilities of $400,000, the current portion of which can not be determined. Nor does the precedent cited by GEP support its argument that $1,065,000 in non-liquid assets is sufficient to demonstrate the availability of a $420,000 commitment. The non-liquid assets to commitment amount multiples of the cited cases range from a low of 16 to a high of 53. These cases do not support a finding that GEP has demonstrated the availability of $420,000. Based on the above, we conclude that the arguments presented have no merit, and the Petition filed by GEP will be denied.

### *Ordering Paragraphs*

55. Accordingly, IT IS ORDERED, that the Petitions for Reconsideration filed by American Cellular Corporation and CR Communications, Inc. respecting Application Numbers 2, 4, 22 and 23 in the Attachment ARE GRANTED, and these four listed applications ARE REINSTATED and are accepted for filing.

56. IT IS FURTHER ORDERED, that the Petitions for Reconsideration respecting all other applications listed in the Attachment ARE DENIED.

57. A copy of this order will be mailed to the Attorney of Record or to the Contact Representative designated in each of the involved Petitions for Reconsideration.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

### *Attachment*

APPLICATIONS ASSOCIATED WITH THIS ORDER

| | |
|---|---|
| 1. Aero-Tel, Inc. | File No. 33400-CL-P-097-A-84 |
| 2. American Cellular Corp. d/b/a ACC of Colo. Springs, Co. | File No. 35125-CL-P-117-A-84 |
| 3. American Cellular Corp. d/b/a/ ACC of Huntsville | File No. 32633-CL-P-120-A-84 |
| 4. American Cellular Corp. d/b/a ACC of Reading | File No. 31901-CL-P-118-A-84 |
| 5. American General Cellular Corporation | File No. 30881-CL-P-097-A-84 |
| 6. Anthony Lucia | File No. 32935-CL-P-112-A-84 |
| 7. Anthony Lucia | File No. 34645-CL-P-101-A-84 |
| 8. Arthur R. Stark, Jr. | File No. 33619-CL-P-112-A-84 |
| 9. Arthur R. Stark, Jr. | File No. 34605-CL-P-101-A-84 |
| 10. Ben D. Downs | File No. 33940-CL-P-112-A-84 |
| 11. Ben D. Downs | File No. 34327-CL-P-101-A-84 |
| 12. Birchman Associates | File No. 33461-CL-P-112-A-84 |
| 13. Birchman Associates | File No. 33590-CL-P-101-A-84 |

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| 14. Brian A. Preston, M.D. | File No. 34455-CL-P-112-A-84 |
| 15. Brian A. Preston, M.D. | File No. 32638-CL-P-101-A-84 |
| 16. Bruce E. Cray | File No. 33969-CL-P-112-A-84 |
| 17. Bruce E. Cray | File No. 34326-CL-P-101-A-84 |
| 18. Burke Muldoon | File No. 34587-CL-P-112-A-84 |
| 19. Burke Muldoon | File No. 32711-CL-P-101-A-84 |
| 20. C. J. Santoro | File No. 34647-CL-P-101-A-84 |
| 21. C. J. Santoro | File No. 34578-CL-P-112-A-84 |
| 22. CR Communications | File No. 30043-CL-P-103-A-84 |
| 23. CR Communications | File No. 30033-CL-P-110-A-84 |
| 24. Carey Windler, M.D. | File No. 34458-CL-P-112-A-84 |
| 25. Carey Windler, M.D. | File No. 32636-CL-P-101-A-84 |
| 26. Carlos Loeffler | File No. 32674-CL-P-112-A-84 |
| 27. Carlos Loeffler | File No. 34659-CL-P-101-A-84 |
| 28. Cellular Systems of America | File No. 34665-CL-P-097-A-84 |
| 29. Cellular Ventures, Inc. | File No. 30567-CL-P-097-A-84 |
| 30. Cellulinear, Inc. | File No. 33406-CL-P-097-A-84 |
| 31. Charles P. Graham | File No. 34658-CL-P-101-A-84 |
| 32. Charles P. Graham | File No. 34457-CL-P-112-A-84 |
| 33. Charles W. Machemehl II | File No. 31762-CL-P-112-A-84 |
| 34. Charles W. Machemehl II | File No. 34325-CL-P-101-A-84 |
| 35. Columbia Communications | File No. 31218-CL-P-112-A-84 |
| 36. Curtis Boyd, MD | File No. 34621-CL-P-101-A-84 |
| 37. Curtis Boyd, MD | File No. 33742-CL-P-112-A-84 |
| 38. David Bonderman | File No. 34820-CL-P-103-A-84 |
| 39. David Bonderman | File No. 34788-CL-P-110-A-84 |
| 40. David Little | File No. 34656-CL-P-101-A-84 |
| 41. David Little | File No. 32934-CL-P-112-A-84 |
| 42. David Sibley | File No. 34330-CL-P-101-A-84 |
| 43. David Sibley | File No. 33939-CL-P-112-A-84 |
| 44. Denman Resources, Inc. | File No. 34841-CL-P-097-A-84 |
| 45. Don Cody | File No. 32737-CL-P-101-A-84 |
| 46. Don Cody | File No. 34434-CL-P-112-A-84 |
| 47. Donald E. Santarelli | File No. 34828-CL-P-103-A-84 |
| 48. Donald E. Santarelli | File No. 33733-CL-P-110-A-84 |
| 49. Dr. Charles W. Monday, Jr. | File No. 34331-CL-P-101-A-84 |
| 50. Dr. Charles W. Monday, Jr. | File No. 32941-CL-P-112-A-84 |
| 51. Dr. Edmond A. Henderson | File No. 32723-CL-P-101-A-84 |
| 52. Dr. Edmond A. Henderson | File No. 34497-CL-P-112-A-84 |
| 53. Dr. R. Lynn White | File No. 34766-CL-P-101-A-84 |
| 54. Dr. R. Lynn White | File No. 33938-CL-P-112-A-84 |
| 55. Dr. Robert L. Clement | File No. 32738-CL-P-101-A-84 |
| 56. Dr. Robert L. Clement | File No. 34431-CL-P-112-A-84 |
| 57. Dutch Colonial Cellular Corporation | File No. 33405-CL-P-097-A-84 |
| 58. Eastern Cellular Communications, Inc. | File No. 33399-CL-P-097-A-84 |
| 59. Eddie Van Dyke | File No. 34694-CL-P-101-A-84 |
| 60. Eddie Van Dyke | File No. 34456-CL-P-112-A-84 |
| 61. Edison Communications Company | File No. 30885-CL-P-097-A-84 |
| 62. Edmund Duckworth, II | File No. 33893-CL-P-101-A-84 |
| 63. Edmund Duckworth, II | File No. 34584-CL-P-112-A-84 |

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| 64. Edmund Duckworth, IV | File No. 32637-CL-P-101-A-84 |
| 65. Edmund Duckworth, IV | File No. 32676-CL-P-112-A-84 |
| 66. Evelyn M. Cummins | File No. 32740-CL-P-101-A-84 |
| 67. Evelyn M. Cummins | File No. 33967-CL-P-112-A-84 |
| 68. Executive Telecom Limited | File No. 33841-CL-P-091-A-84 |
| 69. Fifteenth Street Partnership | File No. 34824-CL-P-103-A-84 |
| 70. Fifteenth Street Partnership | File No. 34819-CL-P-110-A-84 |
| 71. Fifth Street Partnership | File No. 34825-CL-P-103-A-84 |
| 72. Fifth Street Partnership | File No. 34784-CL-P-110-A-84 |
| 73. First Street Partnership | File No. 34821-CL-P-103-A-84 |
| 74. First Street Partnership | File No. 34907-CL-P-110-A-84 |
| 75. Fourteenth Street Partnership | File No. 34827-CL-P-103-A-84 |
| 76. Fourteenth Street Partnership | File No. 34789-CL-P-110-A-84 |
| 77. Frank Siddons, Jr. | File No. 32741-CL-P-101-A-84 |
| 78. Frank Siddons, Jr. | File No. 34430-CL-P-112-A-84 |
| 79. Fraser Family Investments Limited Partnership | File No. 31764-CL-P-112-A-84 |
| 80. Fraser Family Investments Limited Partnership | File No. 33894-CL-P-101-A-84 |
| 81. General Dentistry, Inc. | File No. 30546-CL-P-101-A-84 |
| 82. General Dentistry, Inc. Employees Pension Plan & Trust | File No. 34579-CL-P-112-A-84 |
| 83. George K. Meriwether | File No. 34328-CL-P-101-A-84 |
| 84. George K. Meriwether | File No. 31759-CL-P-112-A-84 |
| 85. Graham-Ewing Properties | File No. 31640-CL-P-096-A-84 |
| 86. Halbert Frazier Associates, Inc. | File No. 33825-CL-P-097-A-84 |
| 87. Harold L. Smitson, M.D. | File No. 34433-CL-P-112-A-84 |
| 88. Harold L. Smitson, M.D. | File No. 33591-CL-P-101-A-84 |
| 89. Hartley Associates | File No. 33970-CL-P-112-A-84 |
| 90. Hartley Associates | File No. 33895-CL-P-101-A-84 |
| 91. Herbert S. Mayberry | File No. 34462-CL-P-101-A-84 |
| 92. Herbert S. Mayberry | File No. 33740-CL-P-112-A-84 |
| 93. Howard Ernest White | File No. 34765-CL-P-101-A-84 |
| 94. Howard Ernest White | File No. 34586-CL-P-112-A-84 |
| 95. Howard W. Davis | File No. 34486-CL-P-101-A-84 |
| 96. Howard W. Davis | File No. 33623-CL-P-112-A-84 |
| 97. Illinois River Mobile Telephone System | File No. 32653-CL-P-103-A-84 |
| 98. J. William Campo | File No. 34830-CL-P-103-A-84 |
| 99. J. William Campo | File No. 33731-CL-P-110-A-84 |
| 100. James G. Dumas | File No. 34494-CL-P-101-A-84 |
| 101. James G. Dumas | File No. 31761-CL-P-112-A-84 |
| 102. James H. Miller | File No. 30548-CL-P-101-A-84 |
| 103. James H. Miller | File No. 32673-CL-P-112-A-84 |
| 104. James K. Merrill & Woodstock Cellular Investments, Inc. | File No. 32705-CL-P-097-A-84 |
| 105. James S. Cox, M.D. | File No. 34323-CL-P-101-A-84 |
| 106. James S. Cox, MD | File No. 33966-CL-P-112-A-84 |
| 107. Jim Cummins | File No. 34620-CL-P-101-A-84 |
| 108. Jim Cummins | File No. 33739-CL-P-112-A-84 |

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| 109. Joan C. Murch | File No. 34773-CL-P-101-A-84 |
| 110. Joan C. Murch | File No. 33971-CL-P-112-A-84 |
| 111. John C. Horton III | File No. 33592-CL-P-101-A-84 |
| 112. John C. Horton III | File No. 33743-CL-P-112-A-84 |
| 113. John Chambers | File No. 34695-CL-P-101-A-84 |
| 114. John Chambers | File No. 34496-CL-P-112-A-84 |
| 115. John J. Sheehan, D.D.S., Inc. | File No. 32672-CL-P-112-A-84 |
| 116. John J. Sheehan, D.D.S., Inc. | File No. 34617-CL-P-101-A-84 |
| 117. John M. Smith, Jr., M.D. | File No. 33744-CL-P-112-A-84 |
| 118. John M. Smith, Jr., M.D. | File No. 32639-CL-P-101-A-84 |
| 119. Joseph D. Ambrose | File No. 32736-CL-P-101-A-84 |
| 120. Joseph D. Ambrose | File No. 34581-CL-P-112-A-84 |
| 121. K. C. Cellular Corporation, Inc. | File No. 32839-CL-P-097-A-84 |
| 122. Kerry G. Merritt | File No. 34921-CL-P-101-A-84 |
| 123. Kerry G. Merritt | File No. 33972-CL-P-112-A-84 |
| 124. Keynote Communications, Inc. | File No. 30880-CL-P-097-A-84 |
| 125. L.L.D., Inc. | File No. 33404-CL-P-097-A-84 |
| 126. Lemon Tree Enterprises, Inc. | File No. 34837-CL-P-097-A-84 |
| 127. Lois M. Winkelmann | File No. 34332-CL-P-101-A-84 |
| 128. Lois M. Winkelmann | File No. 34580-CL-P-112-A-84 |
| 129. Madison Cellular Corporation | File No. 34840-CL-P-097-A-84 |
| 130. Mark Richards | File No. 34696-CL-P-101-A-84 |
| 131. Mark Richards | File No. 34758-CL-P-112-A-84 |
| 132. McDonnell & Company, Inc. | File No. 31854-CL-P-097-A-84 |
| 133. Miller Associates | File No. 30544-CL-P-101-A-84 |
| 134. Miller Associates | File No. 34585-CL-P-112-A-84 |
| 135. Milton C. Parro | File No. 32724-CL-P-101-A-84 |
| 136. Milton C. Parro | File No. 34459-CL-P-112-A-84 |
| 137. Mincom, Inc. | File No. 30884-CL-P-097-A-84 |
| 138. Mrs. Carolyn Vance | File No. 32739-CL-P-101-A-84 |
| 139. Mrs. Carolyn Vance | File No. 43460-CL-P-112-A-84 |
| 140. Nineteenth Street Partnership | File No. 34826-CL-P-103-A-84 |
| 141. Nineteenth Street Partnership | File No. 33726-CL-P-110-A-84 |
| 142. Ninth Street Partnership | File No. 34388-CL-P-103-A-84 |
| 143. Ninth Street Partnership | File No. 34786-CL-P-110-A-84 |
| 144. Oscar Cardenas | File No. 34692-CL-P-101-A-84 |
| 145. Oscar Cardenas | File No. 32931-CL-P-112-A-84 |
| 146. PKO Television Limited | File No. 33398-CL-P-097-A-84 |
| 147. Pacific Technocracy Research & Development, Inc. | File No. 34744-CL-P-097-A-84 |
| 148. Pedro Batarse | File No. 32634-CL-P-101-A-84 |
| 149. Pedro Batarse | File No. 34583-CL-P-112-A-84 |
| 150. R. Craig Colwick | File No. 33594-CL-P-101-A-84 |
| 151. R. Craig Colwick | File No. 33745-CL-P-112-A-84 |
| 152. R. Dale Castleberry | File No. 33463-CL-P-112-A-84 |
| 153. R. Dale Castleberry | File No. 34660-CL-P-101-A-84 |
| 154. Regg-Bell, Inc. | File No. 32879-CL-P-097-A-84 |
| 155. Richard M. Cobb | File No. 34757-CL-P-112-A-84 |
| 156. Richard M. Cobb | File No. 34697-CL-P-101-A-84 |
| 157. Robert H. Park | File No. 34698-CL-P-101-A-84 |

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| 158. Robert H. Park | File No. 32675-CL-P-112-A-84 |
| 159. Robert R. Ratcliff | File No. 34699-CL-P-101-A-84 |
| 160. Robert R. Ratcliff | File No. 33625-CL-P-112-A-84 |
| 161. Robert T. Geyer | File No. 34657-CL-P-101-A-84 |
| 162. Robert T. Geyer | File No. 33618-CL-P-112-A-84 |
| 163. Ronald M. Davis, M.D. | File No. 34582-CL-P-112-A-84 |
| 164. Ronald M. Davis, M.D. | File No. 34329-CL-P-101-A-84 |
| 165. Royeric Pack | File No. 34829-CL-P-103-A-84 |
| 166. Royeric Pack | File No. 34783-CL-P-110-A-84 |
| 167. SBC Communications Corp. | File No. 30589-CL-P-095-A-84 |
| 168. SBC Communications Corp. | File No. 31458-CL-P-096-A-84 |
| 169. SBC Communications Corp. | File No. 31456-CL-P-102-A-84 |
| 170. SBC Communications Corp. | File No. 31457-CL-P-103-A-84 |
| 171. SBC Communications Corp. | File No. 30580-CL-P-111-A-84 |
| 172. SBC Communications Corp. | File No. 32770-CL-P-114-A-84 |
| 173. SBC Communications Corp. | File No. 30579-CL-P-115-A-84 |
| 174. Seventeenth Street Partnership | File No. 33661-CL-P-103-A-84 |
| 175. Seventeenth Street Partnership | File No. 34785-CL-P-110-A-84 |
| 176. Sixteenth Street Partnership | File No. 34389-CL-P-103-A-84 |
| 177. Sixteenth Street Partnership | File No. 34787-CL-P-110-A-84 |
| 178. Sophie T. Wetzel | File No. 32635-CL-P-101-A-84 |
| 179. Sophie T. Wetzel | File No. 31763-CL-P-112-A-84 |
| 180. Stephen P. Kelly | File No. 34495-CL-P-101-A-84 |
| 181. Stephen P. Kelly | File No. 34750-CL-P-112-A-84 |
| 182. Steven L. Little | File No. 32719-CL-P-101-A-84 |
| 183. Steven L. Little | File No. 34432-CL-P-112-A-84 |
| 184. Taylor Interactive Components, Inc. | File No. 34839-CL-P-097-A-84 |
| 185. The Dennis M. Bond Organization, Inc. | File No. 34836-CL-P-097-A-84 |
| 186. The Tenth Street Partnership | File No. 33319-CL-P-103-A-84 |
| 187. The Tenth Street Partnership | File No. 33148-CL-P-110-A-84 |
| 188. Theodore L. Caryl | File No. 34693-CL-P-101-A-84 |
| 189. Theodore L. Caryl | File No. 34589-CL-P-112-A-84 |
| 190. Third Street Partnership | File No. 33662-CL-P-103-A-84 |
| 191. Third Street Partnership | File No. 34818-CL-P-110-A-84 |
| 192. Thirteenth Street Partnership | File No. 33660-CL-P-103-A-84 |
| 193. Thirteenth Street Partnership | File No. 33730-CL-P-110-A-84 |
| 194. Thomas L. Brown | File No. 33937-CL-P-112-A-84 |
| 195. Tom C. Trice | File No. 33892-CL-P-101-A-84 |
| 196. Tom C. Trice | File No. 34588-CL-P-112-A-84 |
| 197. Tom Johnson | File No. 34460-CL-P-101-A-84 |
| 198. Tom Johnson | File No. 33626-CL-P-112-A-84 |
| 199. Tomas L. Brown | File No. 34324-CL-P-101-A-84 |
| 200. Tracy Communications, Inc. | File No. 34838-CL-P-097-A-84 |
| 201. Tri-State Cellular Communications | File No. 34403-CL-P-110-A-84 |
| 202. Twelfth Street Partnership | File No. 34823-CL-P-103-A-84 |
| 203. Twelfth Street Partnership | File No. 33728-CL-P-110-A-84 |
| 204. Twentieth Street Partnership | File No. 34391-CL-P-103-A-84 |
| 205. Twentieth Street Partnership | File No. 33727-CL-P-110-A-84 |
| 206. Vernon Daniels | File No. 32725-CL-P-101-A-84 |

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|---|---|
| 207. Vernon Daniels | File No. 32939-CL-P-112-A-84 |
| 208. Western Systems, Inc. | File No. 32494-CL-P-111-A-84 |
| 209. Westmore Cellular Corporation | File No. 33403-CL-P-097-A-84 |
| 210. William H. Chambers, M.D. | File No. 34461-CL-P-101-A-84 |
| 211. William H. Chambers, MD | File No. 33462-CL-P-112-A-84 |
| 212. William R. Hunt | File No. 34322-CL-P-101-A-84 |
| 213. William R. Hunt | File No. 31760-CL-P-112-A-84 |
| 214. William W. Brown | File No. 33593-CL-P-101-A-84 |
| 215. William W. Brown | File No. 33624-CL-P-112-A-84 |

END

**Application, Amendment of, Right to File**
**Application, Not Acceptable for Filing**
**Mobile Radio Service, Cellular**
**Reconsideration, Petition for, Treated as Appropriate for Review**
**Rules, Failure to Conform**

> **Order on Reconsideration adopted regarding the return of Round IV cellular applications for failure to include required documents or data referred to Commission in order to reach a final decision on acceptability for filing with a minimum of delay. Amendments to submit omitted materials were not allowed. Eight applications were reinstated because the material omitted from the original of the application was actually on file either in other copies of the same application or in other Round IV applications filed by the applicant.**
> ***—American Cellular Enterprises***

**FCC 86-39**

## BEFORE THE
## FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re

Petitions for Reconsideration of the
Return of Round IV Cellular Applications
for the Omission of Required Documents
or Data

## ORDER ON RECONSIDERATION

Adopted January 17, 1986; Released January 24, 1986

BY THE COMMISSION:

1. The cellular applicants listed in the Attachment to this order seek reconsideration of the actions of the Chief, Mobile Services Division, returning certain of their Round IV applications as unacceptable for filing. The petitions have been referred to the Commission under Section 1.106(a)(1) of the Rules in order to expedite a final decision on the matters raised. Since all of these applications were returned as defective because they failed to

contain required documents or data, the petitions concerning the listed applications have been consolidated for reconsideration.

### *Discussion*

2. All of the involved petitioners seek reconsideration of the return of their applications for defects caused by the omission of required documents or data, assertedly through inadvertent clerical error. Consideration of these petitions requires examination of two basic questions: (1) whether applicants can cure defects by amending their applications to supply required documents or data omitted through inadvertent clerical error; and (2) whether applicants can rely on documents and data filed in their other Round IV cellular applications to cure omissions in individual applications.

3. *Amendments to Supply New Information.* Three applicants, Archery Partnership,[1] National Telephone Company,[2] and C&S Communications, Inc.[3] request the Commission to accept properly executed Form 401 signature pages which were omitted from their original applications in violation of Sections 22.6(d) and 22.20(b)(1) of the Commission's rules.[4] Stockton CELCOM Associates[5] seeks to amend its application to include a copy of a map drawn to 1:250,000 scale as required by Sections 22.913(a)(2) and 22.903(a) of the Commission's rules. Finally, Tennessee Radio Telephone

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[1] Application Number 3 in the Attachment.

[2] Application Number 7 in the Attachment.

[3] Application Number 5 in the Attachment. C&S contends that its application was complete as filed and that the signature page must have been lost after filing. In support of its contention, C&S submits a copy of page 6 of the application with an "/s/" on the signature line and an affidavit from its corporate President stating that its application has been signed when it was transmitted to the Commission. We find no merit in this argument. The Form 401 signature page was omitted from both the original application and the copy currently held by the International Transcription Service, neither of which have been available to the public. In light of this evidence, the bare assertion by C&S is insufficient to sustain its burden of proving that the complete application was submitted and the Commission lost the signature page.

[4] Though the petition filed by National Telephone Company notes that its other 29 Round IV cellular applications had been signed, no serious argument is made that these signatures can be used to cure the omission of a signature in its defective application. Section 304 of the Communications Act of 1934 and Section 22.6(d) of the Commission's rules clearly require that an original application be signed. The signature provides certification of the accuracy and completeness of the application. The statutory requirement that an application be signed and sworn to by the applicant is intended to place personal responsibility for the application on the applicant. See B. H. Hart, 20 RR 301, 303 (1960). The assurances provided by certification and the applicant's assumption of personal responsibility cannot be inferred from signatures on other applications.

[5] Application Number 10 in the Attachment.

Corporation[6] seeks reconsideration of the return of twenty of its Round IV applications for various omissions.[7] All of these Petitioners assert that their omissions were minor, inadvertent, clerical errors and that they should be allowed to amend their applications to correct them. Individual petitioners also argue that their applications were "substantially complete," that other Round IV applicants have been allowed to correct minor deficiencies in their applications, that all applicants must be treated equally, and that the staff's actions otherwise would constitute an abuse of discretion.

4. Section 22.20(a) of the Commission's rules provides that an application will be returned to the applicant as unacceptable for filing if: "(1) The application is defective with respect to completeness of answers to questions, informational showings, execution, or other matters of a formal character; or (2) The application does not comply with the Commission's rules, regulations, specific requirements for additional information, or other requirements." Initially, there is no dispute that the applications described above omitted data or documents required to be submitted under the rules of the Commission. Furthermore, we clearly stated that Round IV applications would be carefully pre-screened, and applicants were on notice that only applications acceptable for filing would be included in the lottery. See the *Cellular Lottery Decision*, 98 FCC 2d 175 (1984), at para. 18, and *Advanced Mobile Phone Service, Inc.* (*Chicago Designation Order*), 91 FCC 2d 512, 519 (1982). Although certain petitioners assert that their applications were "substantially complete" when filed, they concede that a waiver of Section 22.918(b) prohibiting pre-lottery amendments to Round IV applications would be required to permit them to supply the data or documents they inadvertently omitted.

5. Upon examination of the circumstances and arguments presented, we are not persuaded that such waiver is justified. The Petitioners have not demonstrated the existence of special or extraordinary circumstances,[8] nor have they demonstrated that the return of their applications and refusal to allow them to file

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[6] Application Numbers 12-31 in the Attachment.

[7] Contrary to Sections 22.917 and 22.13(e) of the Commission's rules, TRTC omitted balance sheets, environmental statements and financial information from 16 of its applications (Application Numbers 12-15, 17, 19-21, 23-28, 30-31 in the Attachment). Similarly, two of TRTC's applications omitted balance sheets and financial data (Application Numbers 16 and 18 in the Attachment) and two others omitted the balance sheets and environmental statements (Application Numbers 22 and 29 in the Attachment).

[8] *See WAIT Radio v. FCC*, 418 F. 2d 1153, 1157 (D.C. Cir. 1969).

curative amendments would be inequitable, or otherwise contrary to the public interest. To the contrary, to permit the petitioners to cure their application defects and be included in the lottery would adversely affect the lottery selection chances of the applications who filed acceptable applications.

6. Moreover, we are unpersuaded by petitioners' substantial compliance and unequal treatment arguments. Petitioners argue, in essence, that the Bureau's *Public Notice*, "Modification of Cellular Round IV Pre-Screening Policy," CL–304, released April 26, 1985, establishes a precedent for acceptance of applications not meeting the filing requirements if they are "substantially complete." That Public Notice did not establish such a policy, however; it merely addressed the situation of widespread confusion in the industry relating to two specific rule requirements. First, the rule requiring a "demonstration" that 39 dBu contours cover at least 75% of the CGSA, which had never been the subject of a definitive interpretation, was deemed satisfied by a statement in the application that coverage was at least 75%. Second, the site availability certification requirement was *not* relaxed, but the Bureau stated that it would entertain petitions for reconsideration in the case of missing certifications because of confusion resulting from a modification in the Form 401 and lack of clarity in certain Public Notices. Petitioners' situation is substantially different from that of the applicants who were given relief by CL–304. Petitioners' applications lacked signatures, maps, balance sheets, environmental statements, or financial data clearly and unambiguously required by the rules. Such omissions cannot be excused on the grounds of reasonable confusion as to the application requirements.[9]

7. Based on the above, we conclude that the applications discussed above were properly returned. We further conclude that the Petitions for Reconsideration respecting such applications lack merit, and they will be denied.

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[9] Petitioners' citation of *Green Country Mobilephone, Inc. v. FCC*, 765 F. 235 (D.C. Cir. 1985) is inapposite. The case on its facts only requires uniform treatment of late-filed applications. Even if we were to apply the principle broadly here, the case would only require that we not return some applications having a particular defect while accepting others having the same defect. Here, we return *all* applications exhibiting the specified defect. In any event, as we discussed above, an applicant failing to include a signature or an item specifically and clearly required by the rules is not in a position comparable to an applicant who reasonably believes a particular showing is not required.

8. *Notice of Other Information of Record.* Seven additional petitioners seek reconsideration of the return of their applications, contending that the document or data inadvertently omitted from a specific application through clerical error was actually filed with the Commission in other Round IV applications and should be accorded Commission consideration. Specifically, Sonic Cellular Communications,[10] and Hooper Matthews, Jr. and Southland Mobilcom, Inc. d/b/a American Cellular Enterprises[11] point out that the financial and ownership information they omitted was identical to that which appeared in their applications in other Round IV cellular markets. Similarly, both TMX Metrocell[12] and Beier Celluphone, Inc.[13] assert that omitted bank commitment letters which rendered their applications defective were filed with the Commission in their other Round IV cellular applications.[14] Pineway Partnership II, (Pineway)[15] and United TeleSpectrum, Inc. (United)[16] argue that they should be credited for documents filed in copies of their applications but omitted from their originals. To correct omissions in its original application, Pineway requests the Commission to take notice of the original signature in the Commission's public reference room copy and United urges the Commission to consider the system map included in the application file copy held by the International Transcription Service. Finally, Millard V. Oakley,[17] omitted page four of FCC Form 401 from his involved application.[18] While Mr. Oakley's submission of a new page four must be rejected as an impermissible amendment, we note that Mr. Oakley filed applications in six other Round IV markets, all of which have been accepted. These

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[10] Application Number 9 in the Attachment.

[11] Application Numbers 1 and 2 in the Attachment.

[12] Application Number 11 in the Attachment.

[13] Application Number 4 in the Attachment.

[14] Metrocell's application to serve the Lancaster, Pennsylvania cellular market mistakenly contained a bank letter demonstrating financing for its Reading, Pennsylvania cellular proposal and its bank letter demonstrating financing for the Lancaster, Pennsylvania market was misfiled in its application to serve Newport News - Hampton, Virginia. Additionally, the commitment letter for financing the Newport News - Hampton, Virginia application was misfiled in the application to serve Reading, Pennsylvania. Beier omitted from one application a copy of a bank letter filed in its 29 other applications which made a commitment to finance all 30 of the applicant's Round IV cellular proposals.

[15] Application Number 8 in the Attachment.

[16] Application Number 32 in the Attachment.

[17] Application Number 6 in the Attachment.

[18] Page four of FCC Form 401 contains a variety of information concerning the applicant necessary for determining compliance with a number of Commission requirements.

other applications each contain page four of FCC Form 401 which would be identical to the page four omitted from his involved application.

9. After full consideration of the petitioners' arguments and the individual circumstances of each application described above, we will accept the applications described in paragraph 8. In contrast to the applications discussed at paras. 3-6, above, for the applications discussed here the Commission had the omitted data in the requisite form on file and available at the time these applications were returned. Since these applications can be reviewed, and all the information required by the rules can be determined without amendments to the applications, we believe that the public interest would be served by granting reconsideration and reinstating the involved applications.[19] Such errors will not be excused in filings for future cellular markets, however. Applicants for markets beyond the top 120 are on notice their applications must be complete and acceptable on an individual basis without reference to other filings. *Memorandum Opinion and Order on Reconsideration*, CC Docket No. 83-1096, FCC 85-117, released May 3, 1985, at paragraph 49.

## *ORDERING PARAGRAPHS*

10. Accordingly, IT IS ORDERED, That the Petitions for Reconsideration filed by Sonic Cellular Communications, Hooper Matthews, Jr. and Southland Mobilcom, Inc. d/b/a American Cellular Enterprises, TMX Metrocell, Beier Celluphone, Inc., Pineway Partnership II, United TeleSpectrum, Inc., and Millard V. Oakley ARE GRANTED, and that their applications listed in the Attachment ARE REINSTATED and accepted for filing.

11. IT IS FURTHER ORDERED, That the Petitions for Reconsideration filed by Archery Partnership, C&S Communications, Inc., National Telephone Company, Stockton CELCOM Associates, and Tennessee Radio Telephone Corporation ARE DENIED.

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[19] Our holding, however, does not extend to the situation where the omitted document could be reconstructed or inferred from information orginally supplied in the application. For example, the Commission will not grant Stockton CELCOM Associates' request to amend its application to include its omitted scale map because the engineering data contained in its application was sufficient to enable the Commission to develop the map. (See note 5 *supra*). The Commission can not excuse the omission of a crucial document simply because it can be reconstructed from data provided in other parts of the application or in other applications filed by the applicant.

12. A copy of this order will be mailed to the Attorney of Record or to the Contract Representative designated in each of the involved Petitions for Reconsideration.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

*Attachment*

APPLICATIONS ASSOCIATED WITH THIS ORDER

| | |
|---|---|
| 1. American Cellular Enterprises | File No. 31161-CL-P-097-A-84 |
| 2. American Cellular Enterprises | File No. 31155-CL-P-093-A-84 |
| 3. Archery Partnership | File No. 33700-CL-P-118-A-84 |
| 4. Beier Celluphone, Inc. | File No. 31649-CL-P-102-A-84 |
| 5. C&S Communications, Inc. | File No. 31320-CL-P-092-A-84 |
| 6. Millard V. Oakley | File No. 31675-CL-P-111-A-84 |
| 7. National Telephone Company | File No. 34861-CL-P-111-A-84 |
| 8. Pineway Partnership, II | File No. 33941-CL-P-100-A-84 |
| 9. Sonic Cellular Communications | File No. 31374-CL-P-117-A-84 |
| 10. Stockton Celcom Associates | File No. 30513-CL-P-107-A-84 |
| 11. TMX Metrocell | File No. 32312-CL-P-105-A-84 |
| 12. Tennesee Radio Telephone Corporation | File No. 33085-CL-P-119-A-84 |
| 13. Tennesee Radio Telephone Corporation | File No. 33275-CL-P-101-A-84 |
| 14. Tennesee Radio Telephone Corporation | File No. 33203-CL-P-102-A-84 |
| 15. Tennesee Radio Telephone Corporation | File No. 33316-CL-P-108-A-84 |
| 16. Tennesee Radio Telephone Corporation | File No. 33479-CL-P-092-A-84 |
| 17. Tennesee Radio Telephone Corporation | File No. 34988-CL-P-093-A-84 |
| 18. Tennesee Radio Telephone Corporation | File No. 35169-CL-P-094-A-84 |
| 19. Tennesee Radio Telephone Corporation | File No. 34989-CL-P-095-A-84 |
| 20. Tennesee Radio Telephone Corporation | File No. 33349-CL-P-096-A-84 |
| 21. Tennesee Radio Telephone Corporation | File No. 34995-CL-P-097-A-84 |
| 22. Tennesee Radio Telephone Corporation | File No. 35181-CL-P-098-A-84 |
| 23. Tennesee Radio Telephone Corporation | File No. 34993-CL-P-100-A-84 |
| 24. Tennesee Radio Telephone Corporation | File No. 33126-CL-P-106-A-84 |
| 25. Tennesee Radio Telephone Corporation | File No. 34994-CL-P-107-A-84 |
| 26. Tennesee Radio Telephone Corporation | File No. 33396-CL-P-111-A-84 |
| 27. Tennesee Radio Telephone Corporation | File No. 34997-CL-P-112-A-84 |
| 28. Tennesee Radio Telephone Corporation | File No. 34992-CL-P-113-A-84 |
| 29. Tennesee Radio Telephone Corporation | File No. 35170-CL-P-116-A-84 |
| 30. Tennesee Radio Telephone Corporation | File No. 34990-CL-P-120-A-84 |
| 31. Tennesee Radio Telephone Corporation | File No. 34991-CL-P-114-A-84 |
| 32. United TeleSpectrum, Inc. | File No. 33050-CL-P-096-B-84 |

END

**Application, Not Acceptable for Filing**
**Mobile Radio Service, Cellular**
**Reconsideration, Petition For, Treated as Appropriate for Review**
**Rules, Failure to Conform**

**Order on Reconsideration adopted regarding return of Round IV cellular applications for failure to disclose the other involved applicants in a pre-filing agreement or the nature of the interest in the surviving application referred to Commission in order to reach a final decision on acceptability for filing with a minimum of delay. Reconsideration granted for all applications because they satisfied the Commission's requirement to disclose the existence of any pre-filing agreements.**
**—*Artcell***

FCC 86-40

## BEFORE THE

# FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re

Petitions for Reconsideration of the
Return of Round IV Cellular Applications
for Omission of Ownership Information
Relating to Pre-Filing Agreements

## ORDER ON RECONSIDERATION

Adopted January 17, 1986; Released January 24, 1986

BY THE COMMISSION:

1. Various Round IV cellular applicants seek reconsideration of the actions of the Chief, Mobile Services Division (MSD), returning their applications as unacceptable for filing. The petitions have been referred to the Commission under Section 1.106(a)(1) of the Rules in order to expedite a final decision on the matters raised. The sole reason for return of the applications listed in the Attachment hereto was the failure to provide adequate information regarding ownership, as required by Section 22.13(a)(1) of the

Commission's rules. Accordingly, the listed applications have been consolidated for reconsideration. A group of San Juan/Caguas, Puerto Rico MSA applicants have jointly filed an opposition. One petitioner, Irish Comcell, has filed a reply to the opposition.

### *Discussion*

2. The petitioners argue that their individual applications fully disclosed their partnership interests and contained a statement that they have entered into a pre-filing agreement. They assert that their ownership exhibits fully comply with the Commission's rules and Public Notices existing at the time Round IV cellular applications were filed. Petitioners argue that the MSD retroactively imposed new, stricter standards when it returned their applications for failure to disclose the identity of other applicants with whom the pre-filing agreement was reached and the nature of the interest in the surviving application.

3. In opposition, various cellular applicants in the San Juan/Caguas, Puerto Rico MSA argue that petitioners' disclosure, on reconsideration, that United Cellular was to be the surviving applicant proves that the petitioners were attempting to skew the lottery in the San Juan market in favor of United. The opponents assert that reinstating the involved San Juan applications would leave unanswered substantial and material questions concerning the real party in interest behind those applications as well as the applicants' candor before the Commission. In reply, Irish Comcell asserts that it is the real party in interest behind its application and argues that the Opposition is a disingenuous pleading.

4. In our *Cellular Lottery Rulemaking*, 98 FCC 2d 175, 201 (1984) (*Lottery Order*), we stated that we would "allow settling parties . . . a cumulative chance to reflect any partial settlement." We also provided that applicants who agree before the applications are filed that they will enter a joint venture will also receive a cumulative chance. "However, to be eligible for a cumulative chance, each applicant must file an individually acceptable cellular application." *Lottery Order*, *supra*, at fn. 73. We further recognized that some applicants may file mass-marketed, non-exclusive applications. While these applications are not *per se* unacceptable, mere "lottery tickets" will not be acceptable for filing. *Id.* at p. 213. We also noted that the Commission has the authority to designate an application for hearing "if a significant and material issue exists regarding the sincerity of a tentative selectee's commitment or ability to provide high quality cellular service as a Commission licensee . . ." *Id.* at p. 214. To provide further

guidance for prospective cellular applicants, the Common Carrier Bureau issued Public Notice, CL-75, released June 6, 1984. On the issue of pre-filing settlement agreements, Public Notice CL-75 cited the Lottery Order and stated: (1) that each individual applicant must be the real party in interest behind its application; and (2) that applicants are under a duty to disclose the existence of any pre-filing agreements.

5. During pre-screening of the Round IV cellular applications, certain factual patterns prompted the staff to question the real party in interest behind some applications. For example, 75 essentially identical (same coverage, engineering, cellular system design) applications were filed for the San Juan MSA. Each contained a statement that the applicant had entered a pre-filing agreement but did not identify the surviving application or the appliants' interest in the surviving application. A close examination further revealed that some of the applicants appeared to be related, *i.e.*, live in the same household or on the same street. For example, five persons with the same last name each applied as sole proprietors. Three of these applicants live in the same household. In addition, ten persons affiliated with one law firm filed separate but essentially identical applications. Based on the information gleaned from the San Juan applications and those for several other markets, it was decided that when applicants do not disclose the parties to their pre-filing agreements, the Commission's effort to determine the real party in interest in cellular applications is totally frustrated. Accordingly, the Common Carrier Bureau issued Public Notice, CL-291, released April 10, 1985, which stated that the MSD staff would issue warning notification letters to those applicants in a pre-filing settlement agreement which do not appear to be independent of the other applications subject to the agreement. These letters would not reject these applications outright but would give the applicants an opportunity to either withdraw from the agreement or dismiss their applications. In addition, Public Notice CL-291 stated:

> Failure to submit information concerning the identity of other applicants with whom a pre-filing agreement was reached, or the nature of the interest in the surviving application in such a case, shall render an application defective for failure to supply adequate information regarding ownership, as required by Section 22.13(a)(1).

The applications listed in the Attachment were returned because they failed to submit sufficient information concerning their pre-filing agreements.

6. After consideration of the evidence and arguments presented, we have decided that we should grant reconsideration and reinstate the listed applications. Although the concerns about the real party in interest behind the involved applications are legitimate, the fact remains that at the time for filing Round IV applications our rules and Public Notices required only that applicants are "under a duty to disclose in their applications the *existence* of any pre-filing agreements." Public Notice CL-75, *supra* (emphasis added). The petitioners did disclose the existence of their pre-filing agreements in their applications, and we cannot reject the applications for failure to provide more information at this stage of the licensing process. We note further that many of the petitioners have filed amendments-of-right under Public Notice CL-291 to notify the Commission that they have withdrawn from their pre-filing agreements. To the extent of such withdrawals, the real party in interest questions are eliminated. However, to the extent that the involved applicants remain in or enter new partial settlement agreements and thereby receive cumulative chances in the lottery, we remind such applicants that the Commission will take a "hard look" at the bona fides of a tentative selectee which received the benefit of multiple chances in the lottery. Public Notice CL-291, *supra*. Furthermore, we also remind petitioners of our warning that if a significant and material issue exists regarding the sincerity of a tentative selectee's commitment or ability to provide high quality cellular service, we have the authority to designate the application for hearing. *Lottery Order*, *supra*, at 214.

## *ORDERING PARAGRAPHS*

7. Accordingly, IT IS ORDERED, that the Petitions for Reconsideration filed respecting the applications listed in the Attachment ARE GRANTED, and the listed applications ARE REINSTATED and accepted for filing.

8. A copy of this order will be mailed to the Attorney of Record or to the Contact Representative designated in each of the involved Petitions for Reconsideration.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

## *Attachment*

### APPLICATIONS ASSOCIATED WITH THIS ORDER

| | |
|---|---|
| 1. Artcell | File No. 32623-CL-P-117-A-84 |
| 2. Artcell | File No. 32456-CL-P-116-A-84 |
| 3. Artcell | File No. 33857-CL-P-096-A-84 |
| 4. Artcell | File No. 34797-CL-P-091-A-84 |
| 5. Butler-Mather Partners | File No. 31417-CL-P-091-A-84 |
| 6. C. S. Cellular | File No. 31422-CL-P-091-A-84 |
| 7. C. S. Cellular | File No. 34385-CL-P-096-A-84 |
| 8. Cascade Cellular | File No. 32350-CL-P-117-A-84 |
| 9. Cascade Cellular | File No. 32451-CL-P-116-A-84 |
| 10. Cascade Cellular | File No. 34427-CL-P-096-A-84 |
| 11. Cascade Cellular | File No. 30893-CL-P-091-A-84 |
| 12. Cedar Hill Farm Corp. | File No. 33718-CL-P-117-A-84 |
| 13. Cedar Hill Farm Corp. | File No. 32665-CL-P-091-A-84 |
| 14. Cedar Hill Farm Corporation | File No. 33923-CL-P-116-A-84 |
| 15. Cellulation General Partners | File No. 33723-CL-P-117-A-84 |
| 16. Cellulation General Partners | File No. 33921-CL-P-116-A-84 |
| 17. Cellulation General Partners | File No. 32199-CL-P-096-A-84 |
| 18. Cellulation General Partners | File No. 31311-CL-P-091-A-84 |
| 19. Christina Communications | File No. 32345-CL-P-117-A-84 |
| 20. Christina Communications | File No. 33922-CL-P-116-A-84 |
| 21. Christina Communications | File No. 34429-CL-P-096-A-84 |
| 22. Christina Communications | File No. 30887-CL-P-091-A-84 |
| 23. Clyde E. Pettit | File No. 33410-CL-P-091-A-84 |
| 24. Francis L. Mita | File No. 31429-CL-P-091-A-84 |
| 25. Germantown Cellular Associates | File No. 31427-CL-P-091-A-84 |
| 26. Germantown Cellular Associates | File No. 33924-CL-P-116-A-84 |
| 27. Germantown Cellular Associates | File No. 32352-CL-P-117-A-84 |
| 28. Herbert Hunt | File No. 31294-CL-P-091-A-84 |
| 29. Hispanic Cellcom | File No. 34799-CL-P-091-A-84 |
| 30. Hispanic Cellcom | File No. 34966-CL-P-096-A-84 |
| 31. Hispanic Cellcom | File No. 32454-CL-P-116-A-84 |
| 32. Hispanic Cellcom | File No. 32622-CL-P-117-A-84 |
| 33. Irish ComCell | File No. 33858-CL-P-096-A-84 |
| 34. Irish ComCell | File No. 31426-CL-P-091-A-84 |
| 35. Irish ComCell | File No. 33919-CL-P-116-A-84 |
| 36. Irish ComCell | File No. 32342-CL-P-117-A-84 |
| 37. John Fisher | File No. 33409-CL-P-091-A-84 |
| 38. Keith Telcom | File No. 32661-CL-P-091-A-84 |
| 39. Kendall Associates | File No. 31432-CL-P-091-A-84 |
| 40. Kendall Associates | File No. 34425-CL-P-096-A-84 |
| 41. Kendall Associates | File No. 32455-CL-P-116-A-84 |
| 42. Kendall Associates | File No. 32621-CL-P-117-A-84 |
| 43. Lawrence B. Gowen | File No. 34709-CL-P-091-A-84 |
| 44. McBrien Cellular Partners | File No. 31306-CL-P-091-A-84 |
| 45. McBrien Cellular Partners | File No. 34817-CL-P-096-A-84 |
| 46. Paul F. Burdett | File No. 34708-CL-P-091-A-84 |
| 47. Paul F. Burdett | File No. 34967-CL-P-096-A-84 |
| 48. Russell H. Long | File No. 32622-CL-P-091-A-84 |
| 49. Stephen R. Ruppert | File No. 31421-CL-P-091-A-84 |

| | |
|---|---|
| 50. William Schoen | File No. 31433-CL-P-091-A-84 |
| 51. William Schoen | File No. 34873-CL-P-096-A-84 |

END

**FCC Jurisdiction**
**Intrastate Facilities**
**Tariff, Jurisdiction of**

> **Telephone company's charges for intracity OPX lines used to carry both inter- and intrastate communications are subject to FCC rate jurisdiction, even if the service is deemed "telephone exchange service" for purposes of 221(b).**
> **—*AT&T***

**FCC 85-368**

**BEFORE THE**

# FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

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| In the Matter of<br>AMERICAN TELEPHONE AND TELEGRAPH COMPANY<br>PACIFIC TELEPHONE AND TELEGRAPH COMPANY<br>SOUTHWESTERN BELL TELEPHONE COMPANY<br>Tariff F.C.C. No. 270, 1.544 Mbps Channels for Connection with Interstate Communications Systems | |

## MEMORANDUM OPINION AND ORDER

**Adopted: July 12, 1985; Released: July 25, 1985**

**BY THE COMMISSION:**

**1. Pacific Telephone and Telegraph Company (Pacific) and the People of the State of California and the Public Utilities Commission of the State of California have filed applications for review of a Memorandum Opinion and Order, Mimeo No. 3267, issued by the Chief of this Commission's Common Carrier Bureau on April 3, 1984 (*April 1984 Order*). No pleadings have been filed in**

opposition. The *April 1984 Order* denied Pacific's petition for reconsideration of a prior ruling (*November 1983 Order*)[1] in which the Bureau directed Pacific to apply an interstate tariff rate for 1.544 Mbps private line service between points within the city of San Francisco that the Crowley Maritime Corporation (Crowley) planned to use for the local distribution of inter- and intrastate, interexchange voice communications and also for the transmission of communications between its outlying offices in the city of telephone stations on the local exchange network.[2] We grant Pacific's application for review to the extent that it calls into question the basis for distinguishing the Commission's ruling in *Department of Defense v. Chesapeake & Potomac Telephone Co.*, (*DoD v. C&P*),[3] but we affirm the Bureau's disposition.

## *I. BACKGROUND*

2. The pertinent circumstances are as follows. Crowley had a requirement for 1.544 Mbps channels to link two of its offices in San Francisco with a PBX installed at a third location in that city. It planned to use the 1.544 Mbps channels for voice communication between its San Francisco offices and points in other exchange areas and in other states via connection at the PBX with inter- and intrastate Wide Area Telecommunications Service (WATS), and "800" Service and interstate private lines. It would also use the channels for communication between users at its San Francisco offices and telephone stations in the same local calling area via connection at the PBX with telephone exchange service business lines. Crowley complained in a letter to the Commission that Pacific had refused to provide the channels under the terms of its interstate tariff, having proposed to apply higher state tariff rates instead. The Bureau issued a show cause order calling upon Pacific to justify its refusal to provide service under the interstate tariff terms.[4] In response Pacific contended, *inter alia*, that as Crowley intended to make use of them the 1.544 Mbps channels would function as "intraexchange PBX off-premises extension lines," or "OPXs," such as the Commission had held in *DoD v. C&P*, *supra*, to be exempt from its regulatory jurisdiction as a form of "telephone exchange service" within the contempla-

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[1] Memorandum Opinion and Order, Mimeo No. 636, released Nov. 8, 1983.

[2] The November 1983 Order also ruled as to another matter that need not be discussed here.

[3] 69 FCC 2d 393 (1978), on *reconsideration*, 71 FCC 2d 1336, *modified*, 75 FCC 2d 45 (1979).

[4] Memorandum Opinion and Order, Mimeo No. 4537, released June 3, 1983.

tion of Section 221(b) of the Communications Act.[5] Hence, Pacific maintained that it had acted properly in offering this service under intrastate tariff and refusing to provide it under interstate tariff.

3. The Bureau concluded in its *November 1983 Order*, however, that Pacific's reliance on Section 221(b) was misplaced. The Bureau asserted that Section 221(b) does not exempt any interstate service from Commission regulation except that rendered by exchange carriers within toll-free local calling areas that overlap state boundaries, citing *New York Telephone Company*, 631 F.2d 1059 (2d Cir. 1980) and *Computer and Communications Industry Association v. F.C.C.*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied* 461 U.S. 938 (1983) (*Computer II*). It then observed that whereas the ruling in *Dod v. C&P* concerned service rendered within a multi-state exchange area, the channels in question in this case were to be provided in the San Francisco exchange area, which is not multi-state. The Bureau therefore concluded that the said ruling in *DoD v. C&P* is inapposite. It let stand this determination on reconsideration in the *April 1984 Order*.

4. Pacific asserts in its application for review that the Bureau erred in attempting to distinguish *DoD v. C&P*. It contends that *DoD v. C&P* cannot be distinguished merely because the ruling in that case concerned OPXs in a multi-state exchange area. While acknowledging that Section 221(b) "may have its intended remedial effect only in multi-state exchange situation," Pacific maintains that Congress could not have intended that a service would be exempt from Commission jurisdiction when provided in multi-state exchange areas and yet be subject to it when provided in single-state exchange areas, which would be an inconsistent and absurd result, in Pacific's view. (Pacific Appl. for Review at page 9). On the contrary, Pacific asserts, it is clear from legislative history and judicial construction that the purpose of Section

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[5] Section 221(b) provides, in pertinent part, as follows:

> Nothing in this Act shall be construed to apply, or to give the Commission jurisdiction, with respect to charges . . . for or in connection with . . . telephone exchange service, even though a portion of such exchange service constitutes interstate or foreign communications, in any case where such matters are subject to regulation by a state commission or by local governmental authority.

47 U.S.C. § 221(b).

Section 3(r) of the Communications Act defines "telephone exchange service" as service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange and which is covered by the exchange service charge.

221(b) is to render the Commission's jurisdictional reach *equal* in single-state and multi-state exchange areas, citing *North Carolina Utilities Commission v. F.C.C.*, 537 F.2d 787 (4th Cir. 1976), *cert. denied*, 429 U.S. 1027 (1976) (*NCUC I*). It follows, then, according to Pacific, that the Commission has no more regulatory jurisdiction over the OPXs in San Francisco than it has over like service provided in multi-state exchange areas such as that wherein the OPXs in question in *DoD v. C&P* were situated. Hence, it contends that the Commission's decision not to preempt regulation of OPX charges in *DOD v. C&P* is controlling here.[6]

## *II. DISCUSSION*

5. We agree that it is not a material basis for distinction between this case and DoD v. C&P that the service at issue here is to be provided in a single-state exchange area whereas the service at issue there was provided in a border-straddling exchange. Clearly, the Commission's jurisdictional reach is no greater in single-state exchange areas than it is in border-straddling exchange areas.

6. It is remarked in the majority opinion in *NCUC I*, *supra*, which is the leading precedent that the Court of Appeals has consistently followed in construing Section 221(b),[7] that the purpose for which Congress incorporated Section 221(b) in the Act was "to prevent the circumstance that a single telephone exchange serves an area that includes parts of more than one state from enlarging the jurisdiction of the FCC over the business and facilities of that exchange .... " *NCUC I*, 537 F.2d at 795. The

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[6] Both applicants contend that the jurisdictional issue presented here is of such wide-ranging significance that it ought not to be addressed except in the context of a rulemaking, as the Bureau's ruling represents the first instance in which federal tariff jurisdiction has been asserted over private-line charges covering carriage between points within an exchange area of local telephone traffic as well as interstate, interexchange communications. The choice of proceeding by rulemaking or adjudication, however, lies within the realm of the Commission's decision, regardless of whether the decision may have general prospective application. F.C.C. v. Chenery, 332 U.S. 194, 203 (1947); New York State Commission on Cable Television v. F.C.C., 669 F.2d 58 (2d Cir. 1982); New York State Commission on Cable Television v. F.C.C., 749 F.2d 804 (D.C. Cir. 1984). The determination that has been reached here follows from a straightforward application of settled principles. We do not see that it would serve any useful purpose at this point to vacate the Bureau's order and postpone granting relief to Crowley and similarly-situated others that may have been refused service under federal tariff pending the institution and resolution of a general rulemaking proceeding.

[7] *See, e.g.*, Puerto Rico Tele. Co. v. F.C.C., 553 F. 2d 694, 698–99 (1st Cir. 1977); New York Tele. Co. v. F.C.C., *supra*; Computer II, *supra*; National Association of Regulatory Utilities Commissioners v. FCC, 746 F.2d 1492 (D.C. Cir. 1984).

opinion does not hold, however, that the Act's general exemption of local exchange service perhaps only to local exchange service rendered in exchange areas that overlap state borders. Such a construction would be strained, to say the least, for there is nothing in the text of the statute which supports it. The point of the discussion in this regard in *NCUC I* is that Section 221(b) adds nothing to what is reserved to the states by the general exemption from Commission regulation of intrastate charges, classifications, etc., in Section 2(b)(1) except as to local exchange service in cross-border exchange areas. Such service, unlike local exchange service elsewhere, would otherwise be subject to the Commission's primary jurisdiction.[8] As the court put it,

> by force of Section 221(b) a local carrier that serves a single multi-state exchange area is assured whatever degree of freedom from federal regulation Section 2(b) provides for uni-state carriers and intrastate telephone business generally.

537 F.2d at 795. The Act's exemption for local exchange service thus has the same force in the San Francisco exchange area as in the multi-state exchange area that was the site of the controversy in *DoD v. C&P*.

7. That said, however, we otherwise affirm the Bureau's holding. It is undisputed that the 1.544 Mbps channels in question here would be used to carry interstate, interexchange communications as well as local tariff and that recurring charges would be assessed for their use during each billing period without regard to the jurisdictional character of the traffic handled. Such charges, covering the carriage of both inter- and intrastate communications, are charges for interstate common carrier communication by wire, *inter alia*, and as such are subject to regulation pursuant to Sections 201 to 205 of the Act, 47 U.S.C. §§ 201–205, notwithstanding that they are also for intrastate communications. Neither Section 2(b)(1) nor Section 221(b) ousts the Commission of jurisdiction over charges for the use of exchange facilities to carry interstate, interexchange communications, as the initial opinion in *DoD v. C&P* acknowledges. 69 FCC 2d at 395 and n.5. See *New York Telephone, supra*; *National Association of Regulatory Utility Commissioners v. F.C.C.*, 737 F.2d 1095 (D.C. Cir. 1984).

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[8] Monthly charges for local exchange service in cross-border exchange areas cover the carriage of both inter- and intrastate communication and would therefore be no less subject to preemptive Commission regulation than charges for "mixed" private line service if it were not for the Section 221(b) exemption. *Cf.* AT&T, 56 FCC 2d 14 (1975), *aff'd sub nom.* People of California v. F.C.C., 567 F.2d 84 (D.C. Cir.), *cert. denied* 434 U.S. 1010 (1978).

8. The determination in *DoD v. C&P* concerning the proper venue for tariff regulation of OPXs used in part for interstate, interexchange communication is not controlling. The Commission remarked in its initial opinion in that case that the use of local exchange facilities to make "interstate or foreign"[9] calls is not subject *per se* to the Section 221(b) exemption because such use is not a form of local exchange service. 69 FCC 2d at 395 and n.5. It concluded, however, that there was "no valid legal basis" for asserting preemptive tariff jurisdiction over charges that covered the use of OPXs for both interstate, interexchange communications and intraexchange calling, the latter of which it considered to be a form of local exchange service within the contemplation of Section 221(b). On reconsideration, the Department of Defense contended that if the Commission were not to preempt regulation of charges covering both types of use then it ought to require the carrier to file a separate tariff with it for the interstate, interexchange use (leaving it to the state to regulate charges for use of the facilities for intraexchnage calling). The Commission disagreed. Reiterating the conclusion that use of the OPXS for local exchange calling was exempt from its jurisdiction and asserting that dual state and federal tariffing was infeasible,[10] the Commission affirmed its refusal to assert regulatory jurisdiction over charges for the mixed-use OPXs. 71 FCC 2d at 1338–39.

9. Thus, it seems that in deciding *DoD v. C&P* the Commission took the view that Section 221(b) barred it from regulating charges that cover the carriage of both local calls and interstate, interexchange communications over intraexchange channels that interconnect with the local telephone exchange network.[11] We do

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[9] The Commission obviously meant interstate, *interexchange* or foreign calls by the expression "interstate or foreign calls" in this context, as interstate, *intra*exchange calling over the public switched network is subject to the Section 221(b) exemption.

[10] The telephone company would have had no ready means of ascertaining what proportion of traffic carried over the OPXs was interstate, interexchange and therefore inherently subject to the Commission's jurisdiction and what proportion was intraexchange or intrastate, interexchange and therefore ostensibly exempt from the Commission's jurisdiction by operation of Sections 2(b)(1) and 221(b). In the absence of such information as to the traffic breakdown, there would be no basis for allocating the cost of providing the service between the carrier's state and federal rate bases. Hence, there would be no basis for a jurisdictional split in the charges, dual tariffing, and concurrent state and federal rate regulation. *See* Smith v. Illinois Bell Tel. Co., 282 U.S. 133 (1930).

[11] If the Commission had taken the view that it *did* have jurisdiction over the OPX charges, but that forbearance was in order for some reason, it presumably would have said so in its opinions. (By way of contrast, it may be noted that in declining to insist upon immediate federal tariffing of PBX tie-line charges in a later decision in the case the Commission made it clear that it had jurisdiction

not agree with that view. Rather, we regard as controlling the doctrine that the Commission espoused in *Telerent Leasing Corp.*, 45 FCC 2d 204 (1974) and that was judicially affirmed in *NCUC I*, *supra*: that where facilities are used in common for local exchange service and to carry interstate, interexchange communications and regulatory separation is infeasible (as it was in *Telerent* concerning interconnection and as it is in this instance concerning rate regulation),[12] this Commission's regulatory prerogative takes precedence over that of state and local authorities, notwithstanding the exemptive provisions of Sections 2(b)(1) and 221(b). 537 F.2d 788, 793–95; *see also NCUC II*, 552 F. 2d 1036, 1045–50, (4th Cir.), *cert denied*, 434 U.S. 574 (1977). Although *dicta* in the *NCUC* opinions suggest that rate regulation is severable,[13] that assumption is not correct with respect to private line services. It would not, as a practical matter, be feasible to impose separate charges for interstate and intrastate use of private lines. If regulation of a mixed use facility is not severable this Commission has jurisdiction over the entire facility. See, e.g., *AT&T-TWX*, 38 FCC 1127 (1965); *United States Department of Defense*, 38 FCC 2d 803 (R.B. 1973), rev. denied FCC 73–854, *affirmed sub nom. St. Joseph Tel & Tel Co. v. F.C.C.*, 505 F.2d 476 (D.C. Cir. 1974); *AT&T* (Interconnection with Specialized Carriers in Furnishing Interstate FX and CCSA), 56 FCC 2d 14 (1975), *affirmed sub nom. People of California v. F.C.C.*, 567 F.2d 84 (D.C. Cir.), *cert denied*, 434 U.S. 1010 (1978); *cf., Computer and Communications Ass'n v. F.C.C.*, 693 F.2d 198 (1982), *cert denied*, 461 U.S. 938 (1983).[14] The decision in *DoD v. C&P* to permit states to regulate

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over those other charges and explained its reasons for temporarily forbearing from enforcing the requirements of Section 203. On further reconsideration of DoD v. C&P, 75 FCC 2d 45 (1979).

[12] *See* n.9, *supra.*

[13] *NCUC I, supra*, 537 F. 2d at 793 n.6, *NCUC II, supra, 552 F.2d at 1047.*

[14] The commingled intrastate services in AT&T-TWX, United States Department of Defense, and AT&T (Interconnection with Specialized Carriers), *supra*, were interexchange in extent or were held for other reasons not to be telephone exchange service and were therefore exempt, if at all, under Section 2(b)(1) rather that Section 221(b). It is contended that the commingled intrastate service in question here, on the other hand, is a form of telephone exchange service. We need not rule as to the validity of that contention, because the distinction is not material anyhow. As this Commission and the courts have construed it, the Section 221(b) exemption is no more absolute than the Section 2(b)(1) exemption, serving merely to render cross-border exchange service exempt from federal regulation to the same extent that Section 2(b)(1) exempts the carriage of intrastate communications. See the authority cited above in the text. *See generally*, NARUC v. F.C.C., *supra*. It would run counter to this accepted interpretation to suppose that Section 221(b) bars the Commission from regulating charges for commingled interstate, interexchange service and

the entire charge for a mixed use facility represents a departure from the standards articulated in relevent Commission and judicial opinions. The *DoD v. C&P* opinion does not contain a persuasive explanation for that result. Therefore, to the extent that *DoD v. C&P* could be read as holding that this Commission is without jurisdiction to regulate charges for mixed use facilities of the sort in question it is overruled.

## *III. ORDERING CLAUSES*

10. Accordingly, IT IS ORDERED, that the application for review filed by Pacific Telephone and Telegraph Company on May 3, 1984 IS GRANTED to the extent indicated herein and IS OTHERWISE DENIED.

11. IT IS FURTHER ORDERED, that the application for review filed by the People of the State of California and the Public Utilities Commission of the State of California on May 3, 1984 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

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local exchange service, inasmuch as it has been held that Section 2(b)(1) does not bar it from regulating charges for commingled interstate, interexchange service and intrastate service generally.

**Common Carrier, Investigation by FCC**
**Common Carrier, Private Communications Service**

**Private line tariff restructuring proposed by American Telephone & Telegraph Co. (Tariff Nos. 9, 10, and 11) permitted to take effect. Revisions generally improve consistency and clarity of carrier's private line offerings; subsequent investigation order to address remaining issues.**
**— *AT&T Communications***

FCC 85-221

BEFORE THE

# FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

| In the Matter of | |
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| AT&T COMMUNICATIONS<br>Tariff F.C.C. Nos. 9, 10 and 11 | Transmittal<br>Nos. 285, 318,<br>342, 346 |

## MEMORANDUM OPINION AND ORDER

Adopted: April 26, 1985; Released: May 28, 1985

BY THE COMMISSION: COMMISSIONER DAWSON CONCURRING IN PART; COMMISSIONER RIVERA DISSENTING IN PART AND ISSUING A STATEMENT.

## *I. INTRODUCTION*

1. On January 18, 1985, the American Telephone and Telegraph Company (AT&T) filed the three captioned tariffs, intended to replace most of AT&T's existing tariffs for interstate private line services. Significant revisions to the proposal were filed March 6, 1985.[1] The proposed restructure is scheduled to take effect April

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[1] On April 8, 1985, AT&T filed two additional sets of revisions. Under Transmittal No. 342, the carrier submitted revisions proposed to become effective April 27, amending proposed F.C.C. Tariff No. 11 to reflect changes made by the local exchange carriers (LECs) March 15 special access tariff revisions. The underlying changes were required by the Commission in the March 8 special access order. Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Phase I and Phase II, Part I, FCC 85-100,

27, 1985, 18 months after AT&T first proposed tariff revisions to recognize the divestiture of the Bell Operating Companies (BOCs)[2] and the access charge tariffs required of LECs by the Commission's Access Charge Orders.[3] During this period, the Commission has extensively reviewed both AT&T's earlier proposals and successive LEC proposals for special access tariffs, under which AT&T would obtain local entrance facilities and services in the post-divestiture environment.

2. The present filings, improved by revisions reflecting petitions and comments filed by others, and concerns expressed by the Commission's staff, do not constitute an ideal rate structure. The deficiencies that remain, however, while warranting further investigation and the imposition of several reporting requirements, do not so undercut the proposal's significant improvements that its effect should be delayed. As with the special access tariffs which recently took effect, this structure is an interim solution — but a solution far superior to past proposals and to the existing AT&T rate structure. Our considered review of the proposal, and the numerous petitions and comments submitted initially and in response to AT&T's recent refinements,[4] satisfy us that allowing

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released Mar. 8, 1985 (*March 8 Order*). These changes would (i) establish a separate rate element for LEC-provided inside wiring on Digital Data, Voice Grade, Telegraph and Terrestrial Audio local channel services; (ii) reduce terrestrial television local channel services to flow through the March 15 special access revisions reflecting reduced polyethylene shielded video (PSV) revenue requirements; (iii) reduce local channel rates in specific local access and transport areas (LATAs) by the same percentage reduction reflected in special access tariffs that became effective April 1, 1985; and (iv) add a "topping" provision for part-time audio services, consistent with revised LEC rates. The same set of revisions lists rates by state rather than LATA (which results in no rate changes), and clarifies the tariff regulations to make clear that only a single access coordination function element will apply to local channels furnished directly between customer premises. Finally, Transmittal No. 342 corrects errors in the existing listings of central offices and available services, contained in Section 5 of Tariff No. 10, to reflect an AT&T audit of engineering records undertaken after the original filing of these tariffs.

Under Transmittal No. 346, also proposed to be effective April 27, AT&T added Section 7 to Tariff No. 10, specifying the vertical and horizontal (V&H) coordinates necessary for customers to cross-reference AT&T central offices with associated LEC serving wire centers. The need for this information is discussed below at paras. 101–103.

[2] United States v. American Tel. & Tel., 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).

[3] MTS and WATS Market Structure, CC Docket No. 78-72, 93 FCC 2d 241 (1983), *recon.*, 97 FCC 2d 682 (1983), *second recon.*, 97 FCC 2d 834 (1984), *aff'd in principal part*, National Ass'n of Regulatory Util. Comm'ners v. FCC, 737 F. 2d 1095 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 1224 (Feb. 19, 1985), *third recon.*, FCC 85-149, April 23, 1985.

[4] Petitioners and commenting parties are listed in Attachment A.

the proposed tariffs to take effect is vastly preferable to a further period of abstract review.[5] A detailed specification of issues to be investigated will be provided in an order to be released shortly.

3. We regard these tariffs as an interim solution — both because AT&T has not fully aligned its proposed rate structure for local channel offerings with the underlying LEC rate structure, and because questions remain about some aspects of the separate rate structure by which AT&T offers service on its own network. We are also concerned that the implementation process proceed smoothly, so that alternatives provided formally in these tariff structures are actually available to customers. To address these concerns, we are (i) requiring that AT&T revise its rate structure for local channels (Tariff F.C.C. No. 11) to comport with the LECs' Serving Wire Center pricing regime within six months; (ii) investigating specific aspects of the AT&T structure, including apparently divergent treatment of the central office connection rate element in the terrestrial television and Dataphone Digital Service (DDS) services, the potential for more general overlap between the central office connection and access coordination rate elements, and nonrecurring charges in general; (iii) investigating the recasting of rates for AT&T's interoffice channel mileage bands; and (iv) requiring that AT&T report on several aspects of the implementation process, including charges imposed for DDS and television service, and the process of implementing the various provisioning arrangements. As a result of our investigation, and experience with implementing this structure, the carrier may propose or the Commission prescribe further revisions affecting existing services. The development of consistent approaches to new offerings that do not parallel existing configurations also remains an important priority.

## *II. BACKGROUND: DESCRIPTION OF AT&T'S PROPOSALS*

4. AT&T's proposal, as amended, employs three tariffs that establish a common and essentially consistent rate structure for most of the traditional private line services: telegraph, voice grade, DDS, Accunet T1.5, wideband (group/supergroup), terres-

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[5] It should be borne in mind that AT&T's projected 1985 return on private line services, were the present rate levels and structure to remain in effect, would be 6.211 percent. This earning shortfall primarily reflects the carrier's payment of increased compensation to LECs, on an interim basis, that it does not fully recover from its own customers. While this situation has no direct bearing on the merits of AT&T's proposal, any substantial delay in implementing the proposal would reasonably occasion alternative requests from the carrier for rate relief.

trial television and audio services.[6] For these services, Proposed AT&T Tariff F.C.C. No. 9 offers interoffice channels (IOCs), over facilities either owned by AT&T or leased pursuant to Shared Network Facility Agreements, between AT&T's central offices and points of connection.[7] Proposed AT&T Tariff F.C.C. No. 11 offers service between AT&T central offices and LEC serving wire centers (SWCs), between SWCs, between AT&T central offices and customer premises, and between customer premises. Facilities used to provide these Tariff No. 11 circuit components are to be obtained by AT&T from the LECs pursuant to special access tariffs. AT&T also proposes to offer under Tariff Nos. 9 and 11 the functional elements — central office connections (COCs) and access coordination functions (ACFs) — necessary to provide end-to-end service. The supplemental functions are separately available as well. Finally, proposed Tariff No. 10 lists rate centers and points of connection, and specifies AT&T central offices — locations at which particular private line services are available and by which the functional components obtained under Tariff Nos. 9 and 11 are demarcated.

5. AT&T proposes for the first time to align pricing of its interoffice channels with the central offices at which they are provided. Properly implemented, this fundamental departure from traditional rate center pricing would permit a clear conceptual and operational demarcation between AT&T and LEC-provided facilities, and would avoid the deficiencies inherent in past rate structure proposals (such as Tariff No. 3) that purported to price service as provided, while in fact leaving substantial play for carrier pricing discretion. When combined with the comparatively unconstrained flexibility accorded customers by AT&T's proposal, the proposed pricing method enables customers to compare alternative service configurations employing (i) access provided by AT&T under Tariff No. 11; (ii) special access provided directly by the LECs; and (iii) arrangements involving alternative access suppliers. It also enables comparison of intraLATA service under Tariff No. 9 with the enumerated alternatives. This proposal more nearly approaches the transparent, self-policing structure long

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[6] These services are mostly terrestrial private line services such as the existing series 1000, 2000, 3000, 4000, 6000 (Terrestrial Audio), 7000 (Terrestrial Television), 8000, Terrestrial Digital Circuits (1.5Mbps) and DDS. There are, of course, other private line services offered by AT&T outside this structure.

[7] A "point of connection" is a rate center specified in Tariff F.C.C. No. 10 in which a private line service may be connected with a service of Alascom, Inc., or international services of others. Tariff F.C.C. No. 9, § 2.10.

sought by this Commission as an alternative to traditional regulatory emphasis on the review of problematic financial support information.[8]

### *A. The Original AT&T Proposal*

6. While presenting the same clear delineation between transmission functions provided directly by AT&T and those obtained by AT&T from the LECs, the structure originally proposed on January 18, 1985 was criticized by commenters for its packaging of two alternative service configurations — one involving AT&T-assembled end-to-end service, including special access furnished under AT&T's Tariff No. 11, and the other predicated on the customer's obtaining special access service directly from the LEC. These two configurations were interwoven with the carrier's three original categories of central office connections (COCs), and the application of COCs determined by the customer's selection of circuit components to be connected at AT&T's central office. The several types of COCs all were originally offered under Tariff No. 9.

7. Type A central office connections would have been employed to connect AT&T's facilities with "other access" — components obtained by the customer directly from the LEC (or other non-AT&T providers). This COC variant thus comprised the discrete functional elements ("access management" or "access coordination") necessary to coordinate the LEC-provided access component with AT&T's interoffice channel, in addition to providing the physical connection between the two components. AT&T explained that this configuration was intended to maintain service of quality comparable to traditional end-to-end AT&T service for customers choosing to obtain special access directly from the underlying LEC carrier. According to AT&T, the "access management" functions included in the Type A connection included (i) access design; (ii) ordering and coordination of the installation of access with AT&T facilities; (iii) pre-service testing and service turn-up; and (iv) trouble sectionalization and restoration coordination. AT&T Transmittal No. 285, Description and Justification, at 1-13 ff.

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[8] The Appendix to the Commission's Memorandum Opinion and Order, Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Phase II (AT&T Communications Private Line Services, Tariff F.C.C. Nos. 3 and 6), FCC 84-292, released Feb. 14, 1985, contains a general discussion of the difficulties encountered in attempting traditional regulation of AT&T's private line service offerings.

8. In contrast, Type B central office connections did not include the access management functions; the Type B connection was essentially a simple physical connection. AT&T's responsibility regarding Type B connections was limited to assuring the technical performance of AT&T facilities and electrical continuity to the access. This COC variant was intended for routine connection of the IOC element with AT&T-provided "local channels" under Tariff No. 11. In this configuration, the access management functions were provided as part of the "local channel" element. As AT&T's "Type B + local channel" package included access management, the end-to-end functional parity with the alternative service configuration was maintained, though the rate structure was somewhat asymmetrical.

9. Finally, the Type C connection would provide connections between components located at the AT&T central office, such as circuit derivation equipment, electronics used to provide supplemental functions (analog to digital conversion), and other office functions.

10. Customers could obtain special access functions in two ways under this originally proposed structure. Under Tariff No. 11, AT&T offered circuits obtained from the LECs and kept in AT&T's inventory for the provision of end-to-end circuits using components from its Tariff Nos. 9 and 11.[9] The "local channel" offered in this configuration included the access management functions separately available under the Type A office connection element, so that a "local channel" when combined with a Type B office connection element constituted a complete, AT&T warranted circuit. Alternatively, the customer could obtain "other access" directly from the LEC (or through arrangements with other access suppliers) and combine it with the AT&T access management functions packaged into the Type A office connection.

11. While the alternative configurations offered in the proposal appeared to establish at least arguably equivalent functional arrangements, the pricing methodology applied to local channels

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[9] The proposal did not require that customers taking a local channel from AT&T also subscribe to the interoffice segment provided under Tariff No. 9. AT&T offers, under Tariff No. 11, intraLATA channels, including channels between customer premises that involve no AT&T central office. The extent to which customers will order such circuits from AT&T tariffs, absent any need for functions involving underlying AT&T facilities, when they are free to order direct from the LEC, is problematic — but neither the original nor amended AT&T structure contains any restriction in this respect.

provided in Tariff No. 11 (after separating out the access management function) departed significantly from the LEC pricing of the same channels. Channels obtained directly from the LECs are priced according to those carriers' tariffs, between LEC serving wire centers (SWCs). Because AT&T was not prepared to pass through that structure, for reasons examined at para. 101, it proposed temporarily to continue rate center based pricing in Tariff No. 11, establishing a divergent rate calculation regimen for the AT&T alternative to LEC-provided access channels. AT&T's approach further categorized local channels under Tariff No. 11 into intra-rate center and inter-rate center channels. The former includes an averaged mileage component; the latter's recovery of mileage charges is distance sensitive (though the mileage is still calculated between rate center coordinates for customer premises, rather than between SWCs).

12. For each category of local channel, moreover, the original proposal provided the access coordination function only for circuits bridged at the AT&T central office. Customers desiring local multipoint circuits bridged at LEC facilities would have had to obtain those circuits directly from the LEC and obtain access coordination functions independently.

13. Although the rates for the alternative end-to-end circuit configurations generally reflected a consistent increment representing the access management functions, the awkward conceptual overlap restricted customers' multipoint configuration alternatives. While it did not appear inherently to establish artificial price incentives,[10] the bundling of two distinct packages and the failure to offer the access management function as a separate element were problematic. In response to customer comments and concerns expressed by the Commission's staff, therefore, AT&T requested and was granted permission to refine the structure in this and other respects, and did so by Transmittal No. 318, filed March 6, 1985.

### *B. The Revised AT&T Proposal*

14. The March 6 amendments accomplished several desirable structural simplifications.[11] Rather than offering the access man-

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[10] While a customer could, for example, subscribe to a local channel and a Type A office connection, incurring needless duplication of functions (and corresponding charges), this was a consequence of a structure intended to avoid restricting the combination of these rate elements.

[11] The same amendments would increase rates for television and some switched services, provide for "topping" of part-time local television services and provide for extending the point of termination at a customer's premises.

agement functions as part of two packaged rate elements, AT&T now proposes to provide these functions as a fully unbundled rate element in Tariff No. 11. That element will be available without regard to whether the customer obtains other rate elements from either Tariff No. 9 or Tariff No. 11. The central office connection (COC) is also generally reduced to a single, unitary configuration. Also, while the customer subscribing to the local channel offering under Tariff No. 11 is now "required" to take the access coordinating function as well, this restriction is one of form only: no purpose is served by AT&T offering bare local channels apart from its coordination function.

15. Of the several structural changes made by the March 6 revisions, one of the most contentious has been AT&T's creation in Tariff No. 11 of new forms of local channels intended to recognize LEC bridging. The "local bridged channel" connects an AT&T office and a SWC bridge or a SWC bridge and the customer's premises; the "local interbridge channel" connects two SWC bridges. Either channel may be provided within a rate center or between different rate centers. While commenters approve AT&T's recognition of LEC bridging, they criticize the mechanism chosen on several grounds, discussed at paras. 108–111. In other respects, the bridging channel refinements maintain the general methodology applied to the original local channels.

### *C. Subsequent Revisions*

16. On April 8, 1985, AT&T filed additional revisions under Transmittal No. 342 to pass through the effects of subsequent Commission actions in the special access proceeding and to make corrections to the listing of central offices and available services contained in Tariff No. 10.[12] By Transmittal No. 346, filed the same day, AT&T supplied V&H coordinates for its central offices, enabling customers to compare the alternative service configura-

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[12] While local channels in Tariff No. 11 were initially listed on a LATA-specific basis, AT&T had determined after preparing those rates that the divergence between LATAs was insignificant within individual states. The Common Carrier Bureau granted AT&T permission to revise Tariff No. 11 to list these rates by state, and those revisions were submitted March 26, 1985 in Transmittal No. 188. The revisions effectively re-indexed the Tariff No. 11 rates by state, as several commenters had urged in their analyses of Transmittal No. 285. This action had no rate effect.

Transmittal No. 342 also established a separate rate element for inside wiring (for LEC-provided service), flowed through LEC rate reductions prescribed by the Commission for local television channels using PSV cable, added a "topping" provision for part-time audio services to comport with the LEC provision, and modified the topping provision for terrestrial television services (originally filed under Transmittal No. 318).

tions enabled by the restructure despite the discontinuity between AT&T's rate center pricing and the LECs' serving wire center pricing of access channels. No comments were received on these revisions.

## *III. PROCEDURAL ISSUES*[13]

17. Petitioners contend (i) that the proposal was filed on insufficient notice for customer assessment of rate impact and possible alternative arrangements; (ii) that it was filed in violation of notice requirements under the Docket No. 20099 Settlement Agreement;[14] (iii) that the prospect of technological bypass requires longer notice to allow the LECs time to assess the implications of the proposal; and (iv) that the Commission's pending private line surchage rulemaking[15] should be resolved before introduction of major alterations to the "market dynamics" for private line service.

18. Initially, we note that the rate increases occasioned by this overall filing are largely imposed by Tariff No. 11, which reflects the LECS' charges to AT&T for Special Access. While, as noted, Tariff No. 11 does not immediately establish a perfectly transparent pass-through of the underlying special access rates,[16] it has long been evident that those rate elements would drive the overall increase; indeed, many of AT&T's rates for the IOC portion of end-to-end services are substantially reduced in this proposal. The major source of the increase in end-to-end rates, therefore, is the underlying LEC rates.

19. The Docket No. 20099 Settlement Agreement is not rele-

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[13] On March 25, 1985 Shaw Data Services submitted a letter response to AT&T's March 21 reply ("Reply II"). On March 29, 1985, American Broadcasting Companies, Inc., CBS Inc., and National Broadcasting Company, Inc., joined by the National Association of Broadcasters, Hughes Television Network, and the Association of Independent Television Stations, filed an "emergency supplemental petition" directed to AT&T's March 6 revisions; Hughes submitted the same day a separate, supplemental petition. AT&T moved to strike these filings on April 10. These pleadings are not provided for by the Commission's Rules and Regulations, and no good cause has been shown why they should be considered. Accordingly, they will be dismissed.

[14] The rates for facilites provided to other common carriers (OCCs) were established by a Settlement Agreement accepted by the Commission as a disposition of Docket No. 20099. *See* American Telephone and Telegraph Company, 47 FCC 2d 660 (1974), 52 FCC 2d 727 (1975), *aff'd sub nom.* Carpenter v. FCC, 539 F.2d 242 (D.C. Cir. 1976).

[15] MTS and WATS Market Structure, CC Docket No. 78-72, Notice of Proposed Rulemaking (Private Line Surcharge), 49 Fed. Reg. 50,413, 54 Rad. Reg. 2d 615 (1984).

[16] Our concern with these imperfections has led to the monitoring and structural revision requirements discussed at paras. 101-103.

vant to Tariff No. 11 because that tariff merely passes through special access rates that LECs charge to AT&T. The Docket No. 20099 Settlement Agreement has already been abrogated insofar as it applies to special access,[17] and petitioners have not presented any reason to treat resold special access differently from special access provided directly to the OCCs by the LECs. Our prior abrogation decision could not reasonably be interpreted to require or permit such a result.[18]

20. The abrogation decision did not, however, apply to Tariff No. 9 facilities that may have been classified as "local distribution" for purposes of the Docket No. 20099 Settlement Agreement.[19] Under the terms of the unabrogated Agreement, the

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[17] In the November 9 Special Access Order we found that Docket No. 20099 Settlement Agreement rates were so low that they violated Section 201(b) of the Communications Act, 47 U.S.C. § 201(b), which requires that charges for communication service be just and reasonable. We also found that the Docket No. 20099 rates granted the OCCs an undue preference in violation of Section 202(a) of the Act, 47 U.S.C. § 202(a), and the rates would impose an excessive burden upon other consumers. Therefore, we abrogated the Agreement, insofar as it related to special access, because it was no longer in the public interest, and prescribed a rate increase based upon our review of the cost data supplied with the rate revisions at issue in the *November 9 Order. See* Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Phase I and Phase II, Part I, FCC 84-524, released Nov. 9, 1984 (*November 9 Order*), paras. 99-100, 103-104; *March 8 Order*, paras, 49, 52.

[18] The phase-in discounts prescribed in the *March 8 Order* are also applicable to special access facilities in place on November 8 that AT&T obtained from BOCs for the ultimate use of OCCs. BOCs will therefore be expected to provide such circuits to AT&T at the discounted rates prescribed in the *March 8 Order*, so that AT&T can pass through such discounted special access rates in its own tariffs to its OCC customers. Application of the special access phase-in discounts to such AT&T-tariffed circuits is effective from April 27, when the AT&T structure reflects these distinct underlying components. The special access phase-in schedule will apply in the future.

The situation created by Bell Atlantic's recent special access filings is somewhat different. As AT&T will offer service generally predicated on underlying special access rates, Bell Atlantic's temporary reliance on tariffs based on the Docket No. 20099 Settlement Agreement requires that it provide circuits for OCCs, who order through AT&T, at these rates (*i.e.*, Docket No. 20099 rates plus 20 percent) until a Bell Atlantic special access tariff becomes effective. (If Bell Atlantic's reliance on non-Docket No. 20099 interim rates for other customers is ultimately found unlawful, we will require AT&T to refund any excess charges for the pass-through to their customers, to reflect AT&Ts, receipt of refunds from Bell Atlantic.)

Methodology for these adjustments is set forth in Attachment C as guide for affected carriers.

[19] Although "local distribution" is generally synonymous with "access service," the OCCs did receive some facilities under the Docket No. 20099 Settlement agreement that do not fit the definition of "access service" that was adopted several years later in our access charge rules. Those "local distribution" facilities are provided to OCCs by AT&T because the facilties were also classified as "interexchange" rather than "exchange access" for divestiture purposes.

OCCs would have the right to pay the Docket No. 20099 rates for a six month notice period if the Tariff No. 9 rates were higher than the Agreement rates. However, it appears from AT&T's rate effect calculations that the Tariff No. 9 rates will generally be lower than the Docket No. 20099 rates for the same facilities.[20] This situation is entirely different from the situation we confronted with respect to the special access tariffs, where we found the Docket No. 20099 rates unreasonably low and unduly preferential. *See* n. 17, *supra*. Here, in contrast, it appears that the new rates under Tariff No. 9 will in most cases actually be lower than the Docket No. 20099. On the record before us, we cannot find the Docket No. 20099 rate to be unlawful so as to justify abrogating the Agreement with respect to AT&T facilities offered in Tariff No. 9. Although the Agreement therefore will continue to remain effective with respect to Tariff No. 9 facilities until the close of the six month notice period on July 18, 1985, we anticipate that virtually all OCCs will pay less overall under Tariff No. 9 than they would pay under Docket No. 20099. If this is the case, the OCCs would be unduly prejudiced if we required them to pay the applicable Docket No. 20099 rates in lieu of Tariff No. 9 rates until the six-month period elapses. Such a result would not serve the purposes of the Settlement Agreement.[21] Therefore, we will not delay the effectiveness of Tariff No. 9 rates for facilities that are presently provided at Docket No. 20099 rates.

21. We do not, however, have sufficiently complete information to warrant that no OCC will pay more under Tariff No. 9 rates for its overall circuit orders than it would have paid for the same facilities under tariffs that implement the Docket No. 20099 Settlement Agreement. If any OCC is in fact prejudiced by the absence of six month's notice, we can use our refund powers to provide a remedy. In order to assist us in determining whether

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[20] Indeed, AT&T's comparison (Attachment 3 to its Reply II) of end-to-end charges to OCCs under Tariff Nos. 9 and 11, with existing Docket No. 20099-based rates, indicates that aggregate OCC charges will increase a tenth of one percent. This estimate is based on AT&T's pricing of 5007 circuits in 10 states — all the ciruits in those states for which AT&T has so far received information from the BOCs. The negligible increase in end-to-end rates emphasizes the mitigating effect of reductions in AT&T's interLATA rates on increased charges to OCCs for the intraLATA segments obtained under special access.

[21] Even if the Settlement Agreement could be interpreted as giving AT&T a right to delay rate decreases for OCCs, AT&T has not invoked such a right, and indeed seeks to make the new private line tariffs effective for all customers as soon as possible.

any refund is appropriate, we will require AT&T to submit a report of this Commission of the total amount billed to each OCC for Tariff No. 9 facilities from April 27 to July 18, 1985,[22] and the total amount that would have been billed for the same facilities under the applicable Docket No. 20099-based rates during that period.[23]

22. Regarding the prospects for technological bypass, the Commission has long recognized that "uneconomic" bypass is a potential, undesirable consequence if distortions in the rate structure influence decisions made possible by unrestricted interconnection between AT&T and other (non-LEC) carriers. Where bypass is a more cost-effective solution to particular circumstances, however, it should not be artificially discouraged. The fundamental interest interest in developing new and more efficient services, responsive to customer demand, is not furthered by artificial constraints on interconnection — including extended notice.

23. As to the Commission's pending inquiry on the private line surcharge, our recognition that this mechanism might be improved does not warrant further delay in the adoption of the broad structural reforms that will benefit the public at large. The deficiencies in AT&T's existing structure should not be maintained until the resolution of that proceeding.

## *IV. SUBSTANTIVE ISSUES*

24. The discussion that follows first addresses issues relevant to the proposal as a whole. Subsequent sections of the discussion separately consider issues that primarily affect Tariff No. 9, 10 or 11.

### *A. General Issues*

#### *1. Bypass*

25. Our understanding of the potential for technological bypass is stated in detail in our recent Bypass Report.[24] Nothing in the

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[22] The six-month notice period under the Settlement Agreement should be computed from January 18 because the relevant cost justification information was filed at that time.

[23] We recognize that rate elements formerly applied to such circuits under different BOC facilty tariffs vary. For comparison, AT&T should deduct special access rates for intraLATA circuit segments (in Bell Atlantic's case, the interim Docket No. 20099-based rates pending an effective special access tariff) from the total circuit charges, and compare the result with Tariff No. 9 charges (including the COC function).

[24] Bypass of the Public Switched Network, Common Carrier Bureau, Dec. 19, 1984, at 24-25.

present record suggests that the partition of AT&T's rate structure better to reflect the actual circumstances of service provisioning will dramatically accelerate bypass. We will require reports from AT&T on requests for such arrangements, and the response taken to them, as well as other aspects of operations under the proposed structure. Such reports should enable us to determine whether alternative arrangements are interfering with the process of implementing arrangements with primary access suppliers.

### *2. Rate Structure Guidelines*

26. Some commenters assert that the proposed structure violates the Commission's private line rate structure guidelines, found in Section 61.40 of the Commission's Rules, 47 C.F.R. § 61.40. The practical marketing imperatives of the post-divestiture environment, together with the Commission's past statements on private line rate structure generally, require that AT&T structure its offerings to recognize the effects of divestiture in some consistent manner. AT&T's present rate structures were originally conceived, in part, to segment the use of network facilities by artificial mechanisms. They were also predicated on the averaging of local distribution costs with interoffice transmission. This averaging of local and interoffice costs is no longer supportable. Indeed, the continued offering of service under AT&T's existing rate structure since divestitute has substantially reduced its private line category earnings; the increased charges for local access incurred by AT&T under interim arrangements with the LECs have not reflected in AT&T's end-to-end rates, which date from the period when AT&T owned the undivested network. Our principles of rate structure review, which the guidelines summarize, cannot be read to compel AT&T to shift the costs of service within its structure to buffer customers who would otherwise be disportionately affected by these access costs. The carrier's responsibility is to prepare a reasonable and not unreasonably discriminatory rate structure. In reviewing such a structure, the Commission must recognize the constraints of the new environment. AT&T no longer retains its ability to buffer rate burdens for customers whose local service components impose higher costs.

27. In any event, we have concluded that AT&T's present proposal is in substantial compliance with our rate structure guidelines. The first rate structure guideline requires an integrated rate structure for like servies. The proposed tariffs

generally treat the affected services consistently. The two exceptions are the station connection element, applied only to terrestrial television and audio services under Tariff No. 9, and the DDS multiplexing element, applied in Tarriff No. 11. As we explain in our subsequent discussion at paras. 53-56 and 89-92, these departures appear to be warranted by the characteristics of these services. Moreover, the presence of two such "aberrations" does not detract from AT&T's accomplishment of streamlining and making consistent the rate elements used to provide a wide range of traditional private line services.[25] With the noted exceptions, therefore, AT&T has substantially complied with this guideline.

28. The second guideline requires that consistent rate structures be applied to comparable services. In this respect, the initial filing was imperfect, establishing two functionally equivalent arrangements for end-to-end service through unnecessarily complicated and overlapping combinations of rate elements. The subsequent revisions unbundling the access coordination functions have essentially resolved this difficulty. The contention that the revised structure permits an overlap in the provision of intraLATA arrangements — which can be obtained under both Tariff No. 9 and Tariff No. 11 — fails to recognize that the divestiture decision contemplated competition between AT&T and the divested LECs (as well as LECs never owned by AT&T) within LATAs. Whether by the mechanism of a separate AT&T tariff recognizing the local distribution function, as here, or by a distinct section within a single omnibus tariff, AT&T was required to reflect this aspect of the new environment.

29. MCI contends that the application of the project liability rate element to voice grade private line services, under both Tariff Nos. 9 and 11, conflicts with the second guideline. The challenged element recognizes the costs that can be imposed on AT&T by speculative or "insurance" ordering of AT&T circuits in large quantities by other carriers who then may cancel such orders if their own facilities are constructed on schedule. It would not be appropriate to review here the Common Carrier Bureau's decision

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[25] The Associated Press and Commodity New Service (AP/CNS) contend that segmentation of these offerings into two tariffs is suspect in light of the Commission requirement that AT&T continue to provide end-to-end service. Consolidated Application of American Telephone and Telegraph Company and Specified Bell System Companies for Authorization Under Sections 214 and 310(d) of the Communications Act of 1934, 96 FCC 2d 18 (1983). To the contrary, the use of two tariffs for the various services effects a major simplification, and AT&T's offering of end-to-end service is unimpaired.

allowing this rate element to take effect,[26] but two observations should be made. First, AT&T's acquisition under tariff of LEC facilities for its inventory of local channels provided under Tariff No. 11 does not alter the underlying problem. Second, and more importantly, the guidelines have never been intended to be applied so inflexibly that circumstances affecting individual services cannot be recognized by appropriate rate elements or rate level differences.[27]

30. The third guideline requires that rate elements reflect independent market or demand requirements, rather than a carrier determination of what it considers appropriate "packages" of functional elements. Whether measured against this independent standard, or compared to the confusing and inconsistently applied rate elements of AT&T's proposed Tariff No. 3, the revised proposal is essentially free of questionable bundling or splintering of rate elements. The interoffice channel is available separately from the termination function, and the latter is provided as a generic central office connection. The central office connection can be used simply to connect two or more IOC components obtained under Tariff No. 9, to connect multiple local access components obtained from Tariff No. 11 or LEC offerings, and to connect components from AT&T's two tariffs to establish an end-to-end arrangement. Having been unbundled from the access coordination function, the central office connection is not otherwise compromised by questionable packaging with other rate elements. The ACF, itself a separately useful function that can be employed either with AT&T local channel offerings or the LEC alternative, including LEC-bridged circuits, is not bundled with the several channel configurations made available under the structure. Finally, and centrally, the structure permits customers to choose between the AT&T-provided local channel furnished under Tariff No. 11 and the directly provided LEC alternative, and even to mix such configurations on a multipoint circuit while maintaining overall coordination by subscribing to the ACF element. Whichever configuration is chosen in a particular instance, the customer's choice of provider does not affect the separate availability

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[26] AT&T Communications, revisions to Tariff FCC Nos. 260 and 266 (Project Liability), Mimeo No. 1613, released Jan. 3, 1985, application for review pending.

[27] "[T]he guidelines do not preclude a carrier, in a given case when a private line tariff does not comply with these guidelines, from justifying its departure from the guidelines and showing that its tariff is just, reasonable, and nondiscriminatory." Private Line Rate Structure and Volume Discount Practices, 97 FCC 2d 923, 926 (1984).

from AT&T tariffs of other rate elements, including the supplemental functions such as channel multiplexing and analog/digital conversion.

31. The fourth guideline requires that rate elements be consistently defined and employed. As described in the recent order on Tariff No. 3, this was a principal deficiency in that earlier structure.[28] In contrast, the present proposal's limited number of rate elements, and their general application within a single, integrated structure to different service offerings, substantially comply with this guideline. The exceptions involve the different types of central office connection and local channel provided in DDS service, discussed at paras, 53-56; and the residual concerns about functional overlap between the ACF and COC elements, both as a general matter and between services, discussed at paras, 57-68.

32. The fifth guideline requires that rate structures be clear and simply stated. In this respect, while the underlying conceptual framework of AT&T's proposal approaches the desired level of clarity and simplicity, at least by comparison to previous efforts, the failure to adopt serving wire center pricing in Tariff No. 11 significantly obstructs price comparisons between the primary alternative service configurations which are otherwise cleanly demarcated. While the carrier does not have the legal responsibilty to provide rate impact information or comparative rate analysis to its customers, the tariff is expected to enable this: facilitating this process was a principal purpose of improving AT&T's rate structure. Unfortunately, even apart from multipoint customers' sometimes highly complex circuits, such analysis under this proposal is far more complicated than it should be. We expect, however, based on AT&T's explanation of the divergent pricing mechanisms employed in Tariff Nos. 9 and 11, that this discontinuity will soon be resolved. With the qualification regarding SWC pricing, discussed at paras. 101-103, the tariffs are better organized and more lucid than past submissions and the structure substantially complies with this guideline as well.

### *3. Cost Support*

33. Petitioners contend that AT&T has failed to furnish sufficient cost support for its proposed restructure in virtually every

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[28] Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Phase II (AT&T Communications Private Line Services, Tariff F.C.C. Nos. 3 and 6), FCC 84-292, released Feb. 14, 1985, at paras, 35-37.

facet — from the recasting of rates in IOC mileage bands, to the derivation of rates for the original and newly revised access coordinating function and central office connection elements. Several of these specific contentions are considered in later sections on the individual tariffs, but some general observations are appropriate here, both regarding the relationship between the cost support required by our Rules and the Docket No. 20099 requirement, and the effect of general compliance with our rate structure guidelines on the cost support material necessary to satisfy Section 61.38 of the Commission's Rules, 47 C.F.R. § 61.38.

34. The Docket No. 20099 Settlement Agreement does not impose greater cost support requirements than those already existing under Part 61 of our Rules. The Agreement requires only that tariff revisions be "supported as required by Part 61 of the Commission's Rules." *March 8 Order* at para. 54.

35. Petitioners also contend that even compliance with the Commission's rate structure guidelines does not lift the burden of compliance with Section 61.38 of the Commission's Rules, 47 C.F.R. § 61.38, but only affects the extent of support required under that provision. Section 61.38 is primarily an aid to Commission review of proposed tariff filings. It does not confer substantive rights on parties opposed to particular proposals.[29] In the present context, while AT&T's compliance with our guidelines is imperfect, AT&T has substantially complied with the guidelines, within the constraints imposed by changes in the underlying special access structure. The remaining deficiencies are, compared to the existing structure and the structure proposed in Tariff No. 3, relatively modest, and we expect they will be rectified within several months. Accordingly, subject to the monitoring requirements and investigative issues stated later, we find the cost support materials provided with Transmittal Nos. 285 and 318 are sufficient for purposes of this review and that they satisfy Section 61.38.

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[29] The requirements of Section 61.38 are not intended to charter independent tariff oversight by third parties. This section exists primarily to assist the Commission in exercising its discretion whether to suspend and investigate proposed tariffs, rather than to confer "important procedural benefits upon individuals." Aeronautic Radio, Inc. v. FCC, 642 F.2d 1221, 1235 (D.C. Cir. 1980), quoting American Farm Lines v. Black Ball Freight Service, 397 U.S. 532, 538 (1970). Thus, information supplied under Section 61.38 may be sufficient to aid the Commission in its exercise of discretion, without necessarily establishing the prima facie lawfulness of the proposed revisions. Associated Press v. FCC, 448 F.2d 1095, 1104 (D.C. Cir. 1971).

*4. Nonrecurring Charges*

36. In our March 8 Special Access Order, we recognized that nonrecurring charges (NRCs) have traditionally failed to recover the actual costs incurred in processing customer orders, initiating service, and ultimately terminating service. Confronted with a lack of cost support for the LECs' proposed nonrecurring charges, however, we determined that further investigation, coupled with a separate accounting order for those charges, would protect users while avoiding the LECs' continued recovery of NRCs from recurring charges. The deficiencies of AT&T's cost support for the NRC elements involved in its proposal raise comparable issues, affecting not only the instant proposal but forthcoming private line services.

37. We recognize that it is essential to understand the allocation of "nonrecoverable"[30] costs by the carrier between rate elements involving continuing monthly charges, paid by all customers, and rate elements applied to the ordering customer at the time of service initiation. The continual re-assessment of competitive alternatives in the present environment, and the potential to use nonrecurring charge elements to affect that assessment, concern us. It is evident that nonrecurring charges can be used as an anticompetitive weapon to restrict resale and discourage competitors from using AT&T's underlying facilities in ways that would be privately beneficial and not publicly detrimental. Large nonrecurring charges would tend to discourage resellers from making use of AT&T facilities. The introduction by AT&T of "notice of discontinuance" charges creates a similar potential for discouraging competitors' access to AT&T's ubiquitous facilities.[31]

38. On the other hand, there are real costs underlying both NRCs and notice of discontinuance charges, and these costs have traditionally not been wholly recovered by the NRC element. Such imprecise recovery of NRCs results in artificial price signals to customers and distorts the allocation of resources. It is thus

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[30] Many costs incurred in circuit installation represent costs properly characterized as "nonrecoverable" — *i.e.*, labor and other expense activities which, if not covered by the actual cost causer, will be passed on to ratepayers but represent no real plant or other direct benefit to the body of ratepayers in general.

[31] Such charges provide for a floating time period, after notice of the intended discontinuation of service has been tendered to AT&T, during which customers are responsible for paying recurring charges. They are often imposed on more complex facilities and services, to enable AT&T to return discontinued circuits to a revenue-producing capacity more rapidly. These charges can also, if artificially inflated, obstruct customer movement between competitors.

important that NRCs be accurately represented, and that dominant carriers avoid the temptation to manipulate these charges for competitive reasons.

39. There are three major types of activity performed when "one-time" work is necessary to install or modify service: administrative and clerical tasks, inside plant functions, and functions entailing travel to outside and non-plant locations. These different types of activity do not necessarily align closely with the generally unitary NRC rate elements proposed by AT&T to recover the costs of service. At present, unitary NRCs bundle aspects from these different activities, and rarely differentiate among them. The various NRCs and "notice of discontinuance" charges present in AT&T's existing tariffs are not devoid of cost support, but we are unable to associate specific NRCs with a generic cost factor or factors. Nor are we able to determine the extent to which AT&T recovers these costs from cost causers or from ongoing charges incurred by all users. In the proposal before us, we cannot fully delineate which functions are covered by certain charges and where coverage of other functions begins, including the ACF. As subsequent private line service offerings are proposed, including "hybrid" services exhibiting aspects of both traditional switched and private line service, this difficulty will become more extensive. Accordingly, the subsequent investigation order will explore in greater detail our concerns with the derivation and application of NRCs.[32]

### 5. *Rate Impact and Estimation*

40. Given the essential integrity of the rate structure, the proposed restructure's rate effects generally reflect the reapportionment to customers of rates that more closely correspond

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[32] GTE Sprint and others contend that AT&T's basis for imposing a NRC for providing the Design Layout Report (DLR) is unreasonable, and not related to costs. GTE Sprint specifically contends that a DLR for a group of circuits should not entail much additional effort over that required for one particular circuit. AT&T responds that GTE Sprint may request only one DLR for one particular circuit if they are satisfied the characteristics of that circuit, from a design perspective, accurately represent those of the other circuits. But AT&T says this may not always be the case; circuit technical characteristics may vary.

We will consider this issue in the investigation of NRCs to be initiated in the near future. We will attempt to determine whether the NRC for DLR is appropriately applied, and whether the costs are properly recovered. With regard to the category of elements imposed as additional administrative and operational charges, we will attempt to determine whether there is some overlap between the existing NRCs of the basic service elements (COC, IOC, AFC) and these additional charges for optional items.

to the carrier's cost of providing service. Rate effects therefore vary substantially as a function both of the service involved, and the particular arrangements employed to serve individual customers. In several of the comments, the complaint is made that AT&T's rate reductions for long-haul rate elements do not fully compensate customers for increased access component charges. This argument misses the central point: if the imbalance between charges imposed under the existing, end-to-end, averaged rate structure's elements and those rate elements established after the partition of AT&T were consistent for all services and customers, it would have been a comparatively simple matter to "reform" the existing rate structure. If partitioning the network at divestiture had resulted in rate reductions for each individual customer's long-haul circuits that balanced the short-haul rate increases, this would suggest AT&T's pre-divestiture structure had perfectly compartmentalized these elements, only pricing them differently. In fact, costs were commingled within and between rate elements as well as services, so that the proposal's combination of partitioning and rate structure reform removes artificial rate structure distortions that are separate and distinct from the IOC/access division.[33] The more transparent AT&T's structure becomes, the more apparent will the underlying cost distinctions associated with particular offerings and service configurations be.

### 6. *Rate of Return*

41. As initially proposed, the revisions would have set rates for voice grade service to earn substantially above AT&T's authorized rate of return — specifically, 15.95 percent. Commenters contend that the rate of return established by the Commission should be applied to individual services. In the March 6 revisions, AT&T essentially responded to this argument; with the exception of wideband service, which experiences no rate increases, projected returns for specific services do not significantly exceed 13 percent, and the Commission's authorization of a 12.75 percent return explicitly contemplated variances from that figure of up to a quarter point.[34] As private line earnings are estimated at 12.75 percent for services covered by these tariffs, and 11.9 percent for the private line category as a whole, there is no need to discuss this issue further.

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[33] See the Appendix to the February 14 Order, *supra* note 8.

[34] American Telephone and Telegraph Co., Petition for Modification of Prescribed Rate of Return, CC Docket No. 79-63, 86 FCC 2d 221, 250 (1981), *recon. denied,* FCC 81-429, released Oct. 8, 1981, *aff'd sub nom.* United States v. FCC, 707 F.2d 610 (D.C. Cir. 1983).

### *7. Discrimination Against Competing Interexchange Carriers; Shared Network Facility Agreements*

42. MCI, USTS and Western Union contend that AT&T's proposed structure discriminates against carriers who combine their own intermachine trunks (IMTs) with AT&T's CCSA and EPSCS switches and access lines[35] in order to offer private line switched services in competition with AT&T's offerings. The AT&T-provided CCSA/EPSCS switches used by both AT&T and its competitors to establish such services are located at AT&T central offices. The offices themselves are often colocated with BOC offices, and the switching ports often are obtained by AT&T pursuant to Shared Network Facility Agreements (SNFA).[36] The competing carriers thus face the necessity of recovering from their customers not only the cost of providing IMTs between points on their "backbone" facility networks, but the additional cost of obtaining separate channels, generally under access tariffs, to connect their points of presence (POPs) with the AT&T CCSA/EPSC switch. The competitors argue that the cost of obtaining these incremental channels, necessary to duplicate AT&T's switched private line network offerings, outweighs the rate advantages they can offer in bidding for service contracts to provide intermachine trunks to large users.[37] Competitors further assert that they cannot realistically replicate an alternative network of such switches and that, in any case, large private network users are unlikely to dismantle their existing, complex networks to utilize such an alternative switched private line configuration, even if it were available.[38]

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[35] In general we use the term "access" in this Order to denote channels supplied by the LEC, AT&T, or alternative providers to connect customers' premises to an AT&T point of presence (central office). Where private line networks involving comparatively scarce switches are involved, however, obtaining "extended access" to a network may require longer, even interLATA IOC components from Tariff No. 9, or comparable channels obtained from another interexchange carrier, in addition to the more local access obtained for traditional services.

[36] AT&T stated in its January 6, 1984 reply comments (during review of Tariff No. 3) that it owned 18 of 21 EPSCS switch arrangements, and 13 of 74 CCSA switching arrangements. Since that time, AT&T has retired one leased EPSCS switch and terminated two other lease arrangements, leaving no EPSCS switches under lease.

[37] *See, e.g.*, USTS first round comments, at 5.

[38] The proposed structure also intensifies their disadvantage, competitors contend, by recasting IOC mileage bands to make OCC-provided IMT channels more expensive, and AT&T's own IMT channels less expensive. The recasting of IOC mileage bands is considered at paras. 69-72.

43. Carriers affected by these circumstances have urged the Commission to undertake one of three respsonses: (i) to require that AT&T partially absorb the local channel charges incurred by its competitors to connect their POPs with AT&T switch locations, by commingling those charges not assessed to AT&T with AT&T's own network costs for providing the same function, thus providing competitors with such access channels without imposing a discrete charge (generally, up to some specified mileage); (ii) to require that AT&T charge its own customers a local channel element for the "extended access" aspect of its own service offerings, even though it does not incur costs warranting such a charge; or (iii) to require AT&T to permit its competitors to colocate their POPs with AT&T switching arrangements. Some carriers assert that the first two remedies should be applied to all AT&T private line switching arrangements, to reflect the ubiquity of AT&T facilities and its colocated offices; MCI limits its plea to the narrower proposition that only the dominant carrier's use of SNFA facilities to provide this functional component confers an improper advantage.

44. The proposed rate structure, because it demarcates between AT&T and LEC channel segments and, in the process, prices AT&T service between central offices rather than abstract rate centers, better reflects the advantages accruing naturally to an interexchange carrier with more ubiquitous network facilities providing extensive access to its switches. We do not believe, however, that restructuring private line services to comport better with the realities of service provisioning justifies suppressing the differences between AT&T's underlying cost structure and the costs faced by its competitors.

45. The "five-mile rule" urged as precedent for the first solution to this asserted competitive disadvantage was imposed by the Modification of Final Judgment (MFJ) in the switched access context. The District Court ordered that interexchange competitors' POPs, when located within five miles of an AT&T Class 4 switch, were to be charged by BOCs for delivery or receipt of traffic at end offices as if they were located in the same rate subzone as the AT&T switch.[39] The court, in effect, required the BOCs to average access costs incurred in serving multiple interexchange carriers, buffering the local rate burdens that AT&T's competitors would otherwise incur to obtain BOC channels linking their networks with BOC end offices. This imposed

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[39] Modification of Final Judgment, Civil Action No. 82-0912, at Appendix B(A)(3) (D.D.C., Aug. 24, 1982).

upon the *local exchange carrier* the obligation to average local distribution charges imposed on competing interexchange carriers, but it did not impose such burdens on the *dominant inter exchange carrier*. The costs averaged in this context were those of the BOC, not a mixture of BOC and AT&T costs.

46. The suggestion to apply that approach here, in contrast, would require that AT&T commingle its competitors' special access charges with its own, separate network costs, effectively averaging its own costs with those of its competitors. This would work directly against the underlying purposes of both Commission policy and the MFJ, by establishing an access pool administered by the dominant interexchange carrier. This is not an appropriate means by which to foster such results, even if the end were considered as important as that sought by the District Court's provision.

47. The second alternative, requiring AT&T to charge its customers for local channels it does not need to obtain separately in order to provide service, could result in unreasonably discriminatory pricing for these customers versus other CCSA customers served over AT&T-owned network facilities. Such a charge would benefit AT&T's competitors at the expense of AT&T's customers. Finally, the broad implications of the proposal to require that AT&T allow OCCs to colocate their POPs at its central offices should not be considered in a tariff proceeding.[40]

48. AT&T's treatment of facilities obtained under SNFAs as part of its network for ratemaking purposes does not vitiate this analysis. Rather than require the immediate and wastefully expensive severance of jointly used facilities, the District Court established the neutral "predominant use" rule for apportioning ownership, with the less heavy user of facilities retaining lease (SNFA) rights. The operational economies actually realized by the parties to such agreements may vary. Absent indications of shortcomings in the asset assignment process, AT&T's retention of usage rights under SNFAs may confer an advantage on AT&T compared to its interexchange competitors, but AT&T's rights in its more ubiquitous facilities and conveniently located switches[41]

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[40] It should be noted that AT&T proposes to allow customers to access its private line central offices with their own access under Tariff Nos. 9 and 11.

[41] The colocation of CCSA switches at a location also serving as a BOC serving wire center does not enable AT&T to escape any charges for the intra-office connection. Here, as under Tariff No. 3, AT&T confronts channel termination costs in such instances and recovers that charge through its own rate structure — here, as the local channel between the CCSA switch port and customer station.

simply reflect its pre-divestiture network configurations. The judicial decision that these facilities should not be artificially bifurcated does not detract from AT&T's legitimate interest in them; had the divestiture court seen fit to sever these facilities outright so that AT&T's comparative advantage involved the outright and permanent ownership of some portion of jointly-used pre-divestiture facilities, and the necessity of quickly replacing others, the SNFA argument would be reduced to a reiteration of the broader theme — that AT&T's ubiquitous facilities and colocated switches in all cases constitute an unfair competitive advantage.

49. The arguments that AT&T's bifurcated structure discriminates against its competitors amount to a plea that the Commission require AT&T to rebundle and reaverage its network termination costs with its local access costs — to help offset competing carriers' real additional costs of interconnecting with AT&T switches. Rather than allow IOC prices to reflect the true costs of competitors' service, and so influence the allocation of customers and economic resources, commenters urge the Commission to average the rates charged AT&T's customers as if that carrier shared its competitors' comparative disadvantage. This proposal carries little assurance of improved consumer welfare in either the short or long run. AT&T, the divested BOCs, and the competing carriers are now independent organizations; yet AT&T's competitors would have us revive pre-divestiture AT&T rate structures — and go beyond them, to average *competitors'* costs. For the reasons stated above, we reject assertions that the structure discriminates unreasonably against competing interexchange carriers.

### *7. Transition and Grace Periods*

50. A large number of commenters have asked that the rate impacts expected under the proposed restructure be delayed or otherwise moderated, citing past Commission actions prescribing transition plans. Commenters refer, for example, to the transitioning of special access rates charged OCCs, proposed in our *November 9 Order* and prescribed under our *March 8 Order*.[42] However, as noted in the introductory discussion, the rate increases implicated by this restructure derive from the pass-

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[42] *March 8 Order* at para. 27 ff. The circumstances which warranted that action, and argued against its extension beyond the OCCs, are explained in detail in that Order, and do not support an uncritical, mechanical application of the transition mechanism to the present context.

through of special access rate increases already in effect, for which there has been ample notice and extended Commission review. Imposing a requirement on AT&T that it continue to buffer the special access rate increases as it has since the beginning of 1984 (under interim contractual arrangements with the LECs) would, in effect, deny AT&T the ability to recover undisputed costs: the tariff charges it pays for special access. To the extent that AT&T's tariff charges under Tariff No. 11 appear unwarranted to customers, they are free to order service from the LEC, but having permitted special access increases to take effect in the tariffs of the underlying carrier, it would be questionable in the extreme to prohibit AT&T now from recovering those charges.

### 8. *Provisioning Coordination*

51. The alternative service configurations made possible by the AT&T rate structure inherently raise the question to what extent facilities employed to implement these arrangements will be segregated by AT&T, both operationally and for cost purposes. Several commenters have argued that the discontinuance of one service configuration and implementation of the alternative does not inevitably entail the full physical take-down and re-establishment of a new circuit, but AT&T responds that its channel inventory will be physically separated for the two configurations, so that costs apart from administrative functions are involved. The application of nonrecurring charges is appropriate for all rate elements involved in such a reconfiguration.[43] To the extent that such actions are involved, the application of nonrecurring charges would be appropriate; to the extent that a less burdensome operation is involved, particularly during the implementation of the new tariffs, charges based on a full physical configuration might be excessive. We have, therefore, established an accounting order for all nonrecurring charge rate elements. As part of our subsequent investigation order, we will establish certain areas for monitoring, to insure that customer reconfigurations of service track the process explained by AT&T.

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[43] "[I]nventories purchased and maintained by AT&T for providing local channels will not be intermingled with other inventories maintained by local exchange companies for providing special access [directly to the customer])." AT&T Reply II at 33. AT&T clarified in its Reply II that no nonrecurring charge element will apply to customers, generally competing carriers, who decide to discontinue Feature Group A or B switched access.

52. Apart from the prospect of newly available service configurations relying on access obtained by customers under LEC tariffs, we recognize that even the more traditional service arrangements involve technical and administrative coordination between AT&T and local exchange carriers in a manner unnecessary until now. Although Pacific Telephone stated in its second round comments that it would prefer to avoid the administrative burdens of providing "other access" to end users and coordinating service involving such components with AT&T, and ICA has advocated a transition period, the record does not persuade us that substantial provisioning difficulties are probable during the implementation of these new arrangements. While we will require AT&T to report on progress in this regard, the maintenance of reliable end-to-end service, however configured, and reasonable service order intervals, requires that local exchange carriers also inform the Commission promptly if they anticipate that difficulties will arise in the future.

### *B. Issues Jointly Affecting Tariff Nos. 9 and 11*

53. Two problems arise from the intertwining of rate elements involved in Tariff No. 9 and those in Tariff No. 11. In the DDS offering, the unique central office connections employed for DDS under Tariff No. 9 and the Digital Local Channels offered under Tariff No. 11 are related in ways that suggest the same functions are provided under two different elements. A second, broader difficulty arises with elements common to several services — the access coordinating function (ACF) and central office connection (COC). While the latter elements primarily involve distinct functions, some degree of overlap may be present.

#### *1. Dataphone Digital Service*

54. In contrast to most services offered in the proposed tariffs, the DDS offering under Tariff No. 9 is connected to other rate elements by two distinct types of central office connection. Similarly, under Tariff No. 11, AT&T's Digital Local Channel (DLC) offering takes two forms. The alternatives are set out below:

| | *Type 1 connects:* | *Type 2 connects:* |
|---|---|---|
| COC(DDS) | Two Office Functions | IOC(DDS) w/ Office Function |
| | Off. Func. w/SDS[44] | |

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[44] Switched Digital Services (SDS) are Accunet Packet Services (APS) or Switched 56 kbps service.

| | *Type 1 connects:* | *Type 2 connects:* |
|---|---|---|
| | IOC(DDS) w/SDS | IOC(DDS) w/SDS |
| | Access w/IOC(DDS) | |
| | Access w/ Off. Func. | |
| | Access w/ SDS | |
| DLC | Customer Premise w/IOC(DDS [+ mpx] | Cust Prem w/SDS [Tariff 4] |
| | | Cust Prem w/ Analog/Digital converter |
| | | Cust Prem w/ Cust Prem |

AT&T explains in the supporting materials for Transmittal No. 285 that the Type 1 DLC connects a customer premises to the DDS network via an LEC hubbing office, and that this DLC variant connects only to DDS interoffice channels provided under Tariff No. 9. In contrast, the Type 2 DLC does not connect to a traditional IOC under Tariff No. 9, but only to other points within the LATA — with the notable exception of AT&T "common user" services. The difference reflects that a Type 1 DLC must access the LEC hub at which circuit derivation for DS-0 (64 kbps) and subrate DDS channels is achieved; the multiplexing function provided at the LEC hub, while separately priced, is invariably associated with this type of DLC.[45] The multiplexing rate element covers the cost of obtaining a high-capacity (DS-1), shared access channel between the AT&T central office and the LEC hub as well as the circuit derivation. The Type 1 DLC provides one LEC-furnished special access digital channel termination, and an element reflecting average or specific mileage, or both. The second channel termination, however, is contained in the multiplexing function.

55. The two types of central office connection also divided along functional lines — but the division appears unrelated to the presence of a hubbing office in the circuit. Type 1 connects access and office functions with other elements; Type 2, in contrast, solely connects office functions with elements on the "network" side of the rate structure's bifurcation. The relationship between these two COC variants is far from clear, and is compounded by the inter-relation with the two types of DLC. It is unclear why two local channel rate elements are necessary for interconnection with different services, as the AT&T-BOC interface is accom-

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[45] The multiplexing function (mpx) includes a channel termination, so that the type 1 DLC channel rate recovers only one special access termination; the other special access termination charge is recovered through the multiplex rate element.

plished at the 1.5 Mbps level in any case.[46] The presence of two different central office connections, after the local channels have discretely recognized the LEC hubbing function, compounds the difficulty.

56. We will require AT&T to delineate the differences between the two types of COC applied to DDS services, in terms of the investment and expense items (by account) used for these rate elements' separate revenue requirements, and indicate the difference in underlying facilities involved for each. With regard to digital local channels, we will require that AT&T provide information regarding the underlying facilities used to provide each, paying particular attention to the assumptions used to derive the multiplexing rate element.

### *2. Overlap Between Access Coordination Function and Central Office Connection Rate Element*

57. Several commenters assert that the proposed tariffs would unreasonably apply the unbundled ACF element and the COC element, and that these elements establish a functional overlap suggesting the duplicative recovery of costs associated with such functions. Other commenters contend these rate elements represent no independent market utility or useful function desired by customers, and so are unreasonably "splintered" in conflict with the third rate structure guideline.

58. It is clear that the latter assertion misunderstands these rate elements. The unbundled ACF element provides functions necessary to coordinate local distribution channels with AT&T's network offerings, though it need not be obtained by users capable of independently providing this functionality. Commingling this function with some other rate element would distort pricing if a customer wishes to obtain ACF independently, or wishes to combine differently configured circuits obtained from different sources and obtain ACF functionality to assure they operate properly in conjunction. As to the COC, the function of connecting IOCs and local access, as well as office functions such as CCSA switching, channel multiplexing, and analog/digital conversion, clearly require a separate element rather than commingling the connection function with widely differing components to be interconnected. The application of these two elements, however, and the possibility of functional and cost overlaps, do concern us.

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[46] Where an LEC hub is interposed in the circuit, the AT&T channel to and from the hub is still connected at the 1.5 Mbps level.

59. In either of the two alternatives end-to-end service configurations, AT&T offers, in effect, a network management function. The ACF element not only assures that, to some extent, the customer's local access is electrically compatible with the AT&T plant to which it is connected, but under this rate element AT&T undertakes to design the access initially, order and coordinate the physical installation, pre-test and turn up the service, and sectionalize trouble and coordinate service restoration to maintain the service as a functioning entity.[47] Under either service configuration (LEC- or AT&T-provided access), AT&T will provide the network management functions that, in its pre-divestiture structure, were reasonably bundled within other rate elements.[48] Divestiture has disaggregated the provision of end-to-end service; the network management function is not inherently a function of the newly separated IOC or the local channel, and customers who do not obtain it from AT&T will deal with both AT&T and the LEC (or alternative access provider) to maintain end-to-end coordination.

60. Similarly, the COC implements a connection function at the demarcation between the AT&T network and access that previously was internal to the integrated network. Its discrete function may vary, and on occasion involve multiple network channels or office functions without access, but the necessity and separate utility of an element recognizing this consequence of divestiture also is apparent. That both the ACF and COC largely perform identifiable and distinguishable functions, necessarily separate in the post-divestiture environment, does not, however, establish that they are as fully separated or cost supported as might be necessary, especially in light of proliferating private line services. Nor does it establish that these elements are in all cases properly applied, nor that their functions do not overlap.

61. The question whether the ACF rate element is more properly applied to a local channel or to the IOC is specifically considered for the multipoint context at paras. 114-115. We have tentatively determined that the ACF (i) cannot consistently be associated with the IOC, because IOC terminations may involve differing ACF burdens and not all IOC terminations even entail an access coordination function; and (ii) multipoint circuits

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[47] The coordination of these functions does not include a guarantee that separately provided components will be provided on a synchronized basis. See para. 62.

[48] In the absence of alternative configurations, no purpose would have been served by a separately available ACF element.

bridged at LEC facilities are more reasonably treated as entailing ACF functionality on a per-customer station basis. However, this is a comparatively coarse judgment that may require adjustment after investigation. While we appreciate that costs associated with multiple customer terminations drive substantial aspects of ACF costs, AT&T should explain why the ACF element should be priced generally on the basis of customer premises terminations, apparently without recognizing either cost areas that might reflect administrative economies of scale (*e.g.*, billing), or diseconomies of scale that attend the provision of ACFs (for, *e.g.*, complicated multipoint circuits).

62. In addition, the access coordination function does not specifically include the cost of maintaining sufficient inventory to assure that when end-to-end service is furnished under AT&T tariffs, all circuit components will be turned up on the specified service date. Instead, AT&T's local channel rate element under Tariff No. 11 apparently recovers the cost of the local channel inventory necessary to attain such synchronization. However reflected in the rate structure elements, under the all-AT&T configuration AT&T does undertake to synchronize the service date for its own interoffice components with access facilities, so that customers avoid incurring charges for separate components that are turned up on schedule, but cannot be used because other circuit components are not yet in place.[49] When the customer directly orders access from the LEC, in contrast, synchronizing service dates between multiple LECs and AT&T raises the prospect of such charges, especially with regard to complex multipoint arrangements. While the tariff is not as clear in this respect as it should be, the warranty of synchronized circuit components is evidently provided only for AT&T's end-to-end configuration.[50]

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[49] To some extent, of course, this can be attained by maintaining inventory of IOC facilities, so that if access channel service dates are synchronized the interoffice segment will not be delayed.

[50] Tariff No. 11 states at Section 2.4.3 that when a customer orders local channel service (a term that necessarily embraces the access coordination rate element), all components of the resulting end-to-end arrangement provided by AT&T will begin service on the same date. Tariff No. 9 states at Section 2.1.1 that "[s]ervice dates of components are independent of each other when the Customer does not obtain the Access Corrdination Function." In fact, however, service dates are independent of each other even when the customer obtains the ACF element, if he also decides to order access directly from the LEC. AT&T should clarify this language with its next tariff revisions.

63. Particularly when implementing complicated circuits, synchronizing access may entail reliance on inventory capacity in several local carriers' jurisdictions — a function that individual customers ordering access directly would presumably find more expensive. We recognize that direct ordering by customers of other access inherently places the customer in the posture of undertaking this synchronization responsibility, and it is not now our intent to require that AT&T independently furnish this aspect of end-to-end service to customers who have elected the benefits and risks, as they perceive them, of the alternative service configuration. At the same time, proper separation of discrete rate elements requires that this function be broken out from other service functions provided with the ACF element, so that its cost can be assessed by customers and the Commission.

64. Initially, we are concerned that the local channel inventory costs associated with the AT&T's end-to-end configuration be separately stated, so that we may determine whether the provisioning synchronization risk is treated as an independent cost associated with the "local channel" element, or is partially commingled with the ACF rate element.[51] Without clear specification of these costs, the structure might appear unreasonably to favor AT&T's own configuration under Tariff No. 11. We will therefore investigate this implicit provisioning synchronization elements, in conjunction with our monitoring of delays experienced in providing the service configuration alternatives. We will require that AT&T report cases in which the customer's IOC liability attaches before access is available (however provided).

65. The COC function, unlike the ACF function, represents investment in such equipment as amplifiers, pads, coils, intra- and inter-building facilities and (for digital services) digital repeaters and repeater bays. While this physical functionality, and the COC rate element's application to situations not involving access, confirm its essential separation from the ACF element, AT&T has not fully explained why the COC rate element should be applied per termination rather than per IOC, or other office function connections. The physical connectivity said to be associated with

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[51] The synchronization function was not a separate rate element before divestiture; to accord customers now obtaining service under the alternative service configurations consistent treatment, it is essential that this aspect of end-to-end service be recognized. After determining the cost of this function, and its relation to network management functions provided under the ACF element for either service configuration, we will be in a better position to consider whether additional action is necessary to assure the nondiscriminatory treatment of customers.

individual terminations should be more completely explained. AT&T should explain and justify the various cost components included in the COC rate element, both in the recurring and nonrecurring charges. It is particularly important that AT&T delineate how it has allocated the COC revenue requirement between these charge categories.

66. In addition, AT&T should explain individual expense and investment accounts for both the COC and ACF, and how they differ from accounts covered in the IOC. To differentiate expenses covered by the ACF from those associated with the COC, AT&T should break out the expense accounts (or portions of accounts) for each element, and similarly explain by service how the revenue requirement for the ACF has been allocated between nonrecurring and recurring charges. AT&T should specify what portion of nonrecoverable costs are covered in the NRCs, and how treatment of COC and ACF rate elements in this respect compare, by service (*e.g.*, telegraph, voice grade, DDS, T 1.5 Mbps, group/supergroup and program services), and with AT&T switching machines and "common user" switched services such as EPSCS, CCSA, APS ports, and the like.

67. AT&T must be sufficiently thorough that the relationship between COC and ACF costs, for both recurring and nonrecurring charges, is clearly defined to enable us to determine that these rate elements, despite their established separate market utility, do not recover the same costs in part. AT&T should explain what specific functions it performs when installing its COC function, and the activities involved in the NRCs initially established for the ACF rate element. These functions should be differentiated from the activities performed by LECs in their installation charges for local channel termination at an AT&T central office.[52]

68. Once the appropriate accounts have been established and assigned to these elements, we will monitor the activities performed in these two rate elements on a periodic basis, and attempt to ensure that costs are recovered in the appropriate manner. We will also monitor these rate elements to determine how revenue requirements are allocated between recurring and nonrecurring charges, and what portion of nonrecoverable costs are being recovered by NRCs.

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[52] AT&T should also explain what separate functions are involved in ongoing maintenance and administration for the COC and ACF elements.

### C. Tariff-Specific Issues: Tariff No. 9

#### 1. Recasting of Interoffice Channel (IOC) Mileage Bands

69. In addition to restructuring rate elements to reflect divestiture and the access charge regime, AT&T has proposed to reprice its interoffice channels provided under Tariff No. 9. After allowing for the effect of unbundling the COC element, the aggregate rate reduction proposed for private line IOCs represents almost a quarter (24.5 percent) of existing IXC revenues. The reductions proposed, however, would not be uniformly applied to existing mileage bands; instead, AT&T would establish comparatively greater reductions for longer-haul IOC circuits, while significantly increasing rates for IOC mileage bands below the 100-mile breakpoint.[53]

70. Commenters contend the proposed IOC rate recasting is discriminatory in its impact on competitors, and unsupported by financial data. MCI asserts that competing private line carriers with less ubiquitous networks, who cannot fully compete with AT&T from their own facilty base, will be burdened not only by rate increases for the shorter-haul facilities they obtain from AT&T where their own backbone facilities are incomplete, but by diminished ability to compete in the longer-haul bands. Dow Jones states that the proposed AT&T short-haul rates for the 11-50 mile band, of particular importance to multipoint customers, are significantly higher than rates earlier proposed under Tariff No. 3 which purported to resolve the effects of divestiture and access charges.[54] The Joint Parties[55] also compare the proposed rates with the changes proposed under Tariff No. 3, and note that the mileage recasting imposed on other private line services is not entirely consistent with that imposed on voice grade services, nor between comparable alternative offerings. The Joint Parties state that competition in provision of short-haul facilities is still extremely limited, and that permitting AT&T to load costs unreasonably on these circuits will only deter the growth of competition in this arena.

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[53] We focus on the voice grade service in this analysis, although several other affected private line services would experience roughly comparable rate effects. The March 6 revisions accentuated the re-allocation of rate burdens to the shorter IOC mileage bands, by slightly reducing mileage rates for voice grade and subrate DDS channels over 500 miles.

[54] The voice grade rates proposed for this band in Tariff No. 3 were $32.00 and $1.60 per mile; in Tariff No. 9 AT&T proposes $55.25 and $2.20 per mile.

[55] American Satellite Company, Competitive Telecommunications Association, RCA Communications, Inc., and Satellite Business Systems.

71. Although AT&T has not provided sufficiently detailed cost support for the revision in long-haul and short-haul rate relationships to enable us to accept this recasting without investigation, a suspension would not be warranted because there is good reason to believe that the revised rate structure is closer to actual costs than the existing rate structure. AT&T has projected a return of -0.436 percent for the recast 1-100 mile rates and 26.2 percent for the recast 100+ mile rates.[56] An error of considerable magnitude would be required to make these short-haul rates unreasonably high or the long-haul rates unreasonably low. Therefore, it appears unlikely that permitting these rates to become effective without suspension will subject any customer to unreasonably high rates or unfairly disadvantage any AT&T competitor in the long-haul market. Moreover, we note that competitors and other customers of AT&T short-haul facilities will have alternatives under some circumstances. Short-haul channels offered under access tariffs can sometimes be used for the same purposes. The comparable short-haul channels in the NECA tariff are priced as follows:

| *Mileage* | *AT&T (Proposed)* | *NECA* |
|---|---|---|
| 1 | 55.00 | 16.10 |
| 4 | 64.05 | 32.66 |
| 8 | 72.85 | 48.53 |
| 25 | 110.25 | 82.13 |
| 50 | 165.25 | 107.12 |
| 100 | 215.25 | 134.98 |

An aggregate rate reduction of 24.5 percent, which disproportionately benefits the longer haul circuits where competitive facility-based alternatives exist while loading rate increases on the less competitive segment of the IOC component, possibly could have implications for the competitive carriers, but given the LEC alternative we consider it more appropriate to allow these revisions to take effect, and investigate the general issue of mileage band loadings.

72. Accordingly, we consider the aggregate reduction in the revenue requirements for the IOC element to be reasonable in light of adjustments made to rates for the separately tariffed service components provided over divested facilities. We regard the mileage band allocations as an interim measure,[57] and will

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[56] AT&T Reply I, Attachment 3, as adjusted by rate revisions in Transmittal No. 318.

[57] The mixed approach taken to differing services also concerns us, in the absence of any explanation why particular service offerings impose distinctive mileage band characteristics.

require that an adequate record be developed before finally determining the proper application of this reduction to particular mileage bands and services.[58] As part of our subsequent investigation, we will examine this matter in more detail, with an eye to confirming expeditiously distinctions AT&T supports with appropriate financial data, or prescribing alternative loadings.

### 2. *Increased Rates for Television IOC and Station Connection Components*

73. The original January 18 AT&T proposal limited rate increases for the terrestrial television service to those occasioned by passing through special access rates and applying the new central office connection rate element to television service. Thus, an overall rate increase of some 12 percent would have been imposed on television service, and that service would have earned a 0.135 percent overall return.[59] In its March 6 revisions, AT&T proposed a 46 percent rate increase for the station connection and IOC components of full-time television service provided over AT&T facilities, an aggregate increase (both Tariff Nos. 9 and 11) of 25 percent over the January 18 proposal.[60] This increase would generate a projected return of 12.89 percent for the television service.

74. The television service customers opposing the March 6 increases[61] did not generally object to the Tariff No. 9 proposals as initially filed; the networks, for example, while reserving their contention that the carrier's supporting data understate demand and overstate investment and expenses, also stated that AT&T's proposal appeared to implement the divestiture and access charge

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[58] If our investigation confirms AT&T's figures, a further recasting of mileage band cost loadings beyond those proposed here may be warranted.

[59] We do not address the central office connection in the context of these disputed rate increases. Its effect is to impose approximately a 1 percent rate increase on the television service provided over AT&T facilities. The major television networks (American Broadcasting Companies, Inc.; CBS Inc.; and National Broadcasting Company, Inc.) asserted in their original comments that the central office connection element had not been justified. This issue and the station connection rate element's relation to the central office connection are discussed at paras. 89–92.

[60] The Commission has since required the LECs to file lower video access rates, which will diminish the overall increase. *See March 8 Order*.

[61] The User Parties jointly filing against the March 6 revisions are the major television networks, joined by Hughes Television Network, the Association of Independent Television Stations, and the National Association of Broadcasters. Hughes and Liberty Mutual Insurance Company filed independent comments as well.

decisions. The subsequent revisions proposing major increases for the IOC and station connection (SC) elements, however, are now assailed as (i) unwarranted by any changed circumstances since the January 18 filing; (ii) based on seriously understated demand, and intended to force customer migration to AT&T's five-year fixed-rate offering; and (iii) based on exaggerated investment and expenses.

75. Specifically, the User Parties assert that demand projections for full-time service based on their recent polling of television operational personnel are more realistic than AT&T's and, if realized, would generate $0.7 million more than AT&T's projected incremental revenues from the March 6 revisions of $14.8 million. The same updated demand projections, the User Parties contend, if applied to the existing rates, would generate $9.8 million more in revenue than AT&T projected in its January 18 filing. As for the part-time service, they assert that AT&T's projection of a 23 percent reduction in 1985 from 1982 actual usage fails to reflect the User Parties' intention to continue use of terrestrial part-time services (assuming no rate increase) even as full-time network usage shifts to satellites. The commenters also state that AT&T's past demand projections have often been off the mark. With respect to claimed investment, the commenters contend that AT&T's investment in IOC and station connections is overstated by some $30 million, and further that AT&T's projected 75 percent reduction in full-time service and 23 percent reduction in part-time service are accompanied by a reduction in claimed investment of only 22 percent. Commenters state that, either by failing to reassign plant in proportion to expected demand curtailment, or by not eliminating excessive pre-divestiture investment to reflect operating efficiencies, AT&T has artificially inflated the facility base against which its return for television services is calculated.

76. AT&T's demand and revenue forecasts for terrestrial television service are described in Tariff Filing Practice (TFP) 1382. In its Reply, AT&T states that it solicited demand estimates from the networks in November 1984 for purposes of developing rates, and was informed that their full-time systems' demand was expected to decrease by 75 percent in 1985. AT&T concedes that the rates filed March 6 reflect those earlier estimates, but AT&T's recalculation of earnings, predicated on the networks' own demand estimates contained in their petition, would improve AT&T's return only to 13.6 percent. The differences in full-time demand, including the reduced speed at which major full-time

customers are converting to satellite alternatives, when translated into rate difference in compliance with the Interim Cost Allocation Manual (ICAM) methodology, do not represent a large difference in earnings compared to the gap between the 0.135 percent return proposed in January and the 12.89 percent rate of return that AT&T now proposes to close.

77. Part-time rates, according to AT&T, show a similar insensitivity to asserted demand projection errors. Based on actual 1984 usage, rather than the 1982 data employed by the User Parties, AT&T estimates a 7 percent increase in part-time demand. As the networks anticipate no significant change, this increase should come from other parties. AT&T states that although its estimated demand may be slightly optimistic, the record of declining part-time demand in recent years suggests the User Parties' alternative projection is even less likely to be vindicated:

*Part-Time Average Monthly CMH*[62]

| | *1983* | *1984* | *1985* |
|---|---|---|---|
| Actual | 1,872,868 | 1,609,000 | -- |
| AT&T Forecast | 2,290,048 | 1,731,104 | 1,723,030 |

The Parties estimate actual 1985 monthly part-time use at 2,135,444 CMH.

78. As to the investment and expense figures, AT&T asserts that the Commission determined in 1982 that AT&T had complied with the ICAM allocation methodology, and contentions that excessive broadband microwave technology was allocated to television are not properly revived in this context. Similarly, AT&T contends, its allocation of overall investment to television service has not been questioned by the Commission in past proceedings, despite the networks' repeated efforts to raise that issue. Cost savings implemented in 1978 to improve television operating center efficiencies, AT&T states, were reflected in its investment base, and no new information is submitted to warrant review of that determination.

79. Initially, the User Parties' argument that AT&T was somehow bound by its initial filing is without merit. It is well established under the Communications Act that carriers have the right, as an initial matter, to propose rate changes. *MCI v. FCC*, 561 F.2d 365 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978).

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[62] The Channel Mile Hours (CMH) for 1984 are said by AT&T to be based on billable hours. In response to a staff request, AT&T explained by letter of April 16, 1985 to the Chief, Tariff Division, that billable hours represent a twelfth of total 1984 hours actually used (before adjustment for outages).

AT&T is not bound by the pendency of a prior revision of narrower scope to refrain from further revisions, nor is it required to establish "changed circumstances." The related contention that the proposed increases represent a "migration strategy" designed to drive customers to AT&T's five-year-term rate fails to recognize that this alternative rate, which became effective in November 1984, was instituted by the carrier in response to customer requests and so far has had no takers. As the fixed-term rates represent a rate reduction compared to full-time service, with no attendant cost saving for the carrier, this does not appear to be a profitable instance for the application of a migration strategy.

80. In considering the parties' assertions that AT&T's rate increases are unwarranted, it should be borne in mind that the existing rates in Tariff F.C.C. No. 260 represent a compromise negotiated between AT&T and its principal television customers after AT&T's earlier efforts to increase rates. They do not represent rates prescribed by the Commission, or found lawful on the basis of an investigation of costs. AT&T notes in its Reply that while full-time IOC rates for television have increased 45 percent since 1974, the Consumer Price Index has risen 156 percent. While such comparisons do not support the reasonableness of AT&T's proposal, they do underscore the low rate of return that existing rates would provide the carrier for furnishing terrestrial television service.[63] It should also be remembered that terrestrial television service, as evidenced by the networks' plans for satellite use, is a mature service dominated by large customers several of whom individually represent a significant portion of demand.

81. (a) *Demand*. The User Parties' full-time demand projections are used to support their contention that AT&T's existing rates would generate $9.8 million in 1985 revenues beyond AT&T's estimates.[64] That extrapolation does not, however, account for the costs of providing additional service. AT&T's recalculation of results based on the network demand figures, but recognizing such costs,[65] indicates that realization of the network demand

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[63] For purposes of comparison, the January 18 filing proposed a 49 percent increase in telegraph service rates, to attain a 1.39 percent return.

[64] The User Parties complain at length of AT&T's failure to update its demand projections by polling users. As the potential effect of substantial demand shifts is familiar to the networks after their long relationship with the carrier, these sophisticated customers should not be reticent in initiating such contacts. They, after all, are in control of their shift to satellite-based services and use projections.

[65] The AT&T demand calculations were predicated on AT&T's part-time demand estimates. For the reasons stated below at paras. 82–83 we find this predictive

estimates would result in a 13.6 percent rate of return. In light of the contingencies of increased satellite use and possible customer shift to the fixed-term offering, such a potential difference does not warrant revision.[66]

82. The User Parties also contend that AT&T's part-time demand projections are inaccurate, citing the carrier's past difficulty with projections and its failure to poll the largest users of part-time service. AT&T's estimates, however, are founded on more recent 1984 usage of IXC channels, and follow a recent trend of slowly declining part-time use. Indeed, as part-time use in 1984 declined from 1983 despite several unusual events—the Olympics, and the presidential primaries, conventions and election coverage—the declining trend may be understated by the base numbers. In any case, as the networks state their intention to continue their part-time use without significant change and other users have not specified their projected demand for part-time service in the User Parties' petition, no basis has been demonstrated for adjusting this estimate.

83. Apart from the absence of any basis for revising AT&T's part-time demand estimates, they contain an internal bias favoring customers somewhat. Because AT&T's projections reflect no repression of demand as a result of its rate increases, any reduction in demand occasioned by these increases—a reduction that could justify a compensating rate increment—will not be compensated for under AT&T's proposal.

84. (b) *Investment and Expense.* Respecting investment and expense figures, the User Parties' assertions appear to be grounded in a continuing refusal to accept the implications of the ICAM.[67] Rather than reflecting AT&T's full distribution of private line category expenses and investments to the various services, the petitioner's assertions that AT&T's assignment of investment and expense to television is overstated is itself based on data submitted by AT&T in CC Docket No. 81-351—data that

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assumption reasonable.

[66] The inherent imperfections of demand projections have, in the television context, been exacerbated by the uncertainty of the largest television customers' plans for implementing alternative distribution networks using satellite facilities. The carrier faces imponderables with essentially no recourse, should its projections result in revenues that do not adequately cover the cost of service. The customers, in addition to exploring and implementing alternative services, are free to employ AT&T's longer-term terrestrial service at lower rates, and in addition have the formal complaint mechanism available to them as a remedy for unjustified overcharges.

[67] Report and Order, CC Docket No. 79-245, 84 FCC 2d 384, *recon. denied,* 86 FCC 2d 667 (1981), *aff'd sub nom.* MCI v. FCC, 675 F.2d 408 (D.C. Cir. 1982).

only partially reflect ICAM methodology, and do not reflect divestiture. The subsequently employed Private Line Cost System (PLCS), introduced by AT&T when it filed Terrestrial Digital Circuits in June 1982, further increased the investment and expense assigned to television service, apart from inflation effects.

85. The television users' contentions appear to be grounded on comparatively outdated information, combined with central misconceptions regarding the application of investment and expense to these services. The Commission has determined in previous proceedings that AT&T "allocated costs to television service in accordance with the January 1981 ICAM,"[68] and review of subsequent television offerings has turned largely on matters of rate structure. The users' contention that AT&T has since increased television investment, despite countervailing demand decreases, amounts to an effort to reargue that ICAM determination. Under the ICAM, allocation of overall investment to television service properly reflects relative use of private line services generally, not simply inflation and the demand for television service. In any case, the demand projection variations noted by the User Parties do not appreciably affect the reasonableness of the carrier's estimates, once the ICAM is accepted as the proper methodology for allocation of investment to particular private line services.

86. (c) *Conclusion*. Terrestrial television customers are some of the most sophisticated consumers of AT&T private line services, as evidenced by their extended and persistent negotiations with the carrier in recent years, and their continued exploration and development of alternative service arrangements. AT&T is entitled to a reasonable opportunity to recover its costs, and is not prevented from doing so by its earlier decision, in effect, to accept temporarily a lower rate of return for terrestrial television services.

87. For the reasons described above, we are more inclined to credit AT&T's demand estimates than the networks' alternative calculations. The assignment of expenses based on PLCS apparently follows the Commission's directions to the carrier in the CC Docket No. 81-351 proceeding; while we will ask for confirmation that the directions in that proceeding are incorporated in the PLCS methodology, we are also inclined to accord greater weight to AT&T's recent experience than the 1982 data relied on by the

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[68] AT&T Revisions to Tariff F.C.C. Nos. 258 and 260 and Establishment of Tariff F.C.C. No. 269, (Series 7000 Terrestrial Television Services) CC Docket No. 81-351, 85 FCC 2d 1656 (1982).

networks, which does not even fully reflect ICAM requirements.

88. The pace of recent developments in this particular service dramatically demonstrates the inefficiency of administrative investigations. Rather than commit limited Commission resources to a detailed examination of these issues in such a fluid situation, we will impose an accounting order on the television services provided under Tariff No. 9. We expect AT&T to provide a balance sheet for television services for the first 90 days of operations under Tariff No. 9, including a comparison of 1985 demand projections made in this proceeding with actual billable hours. If downward revisions of the rate levels (hours or miles, or both) are indicated by unexpectedly high demand levels at that juncture, the accounting order will protect customers; if, alternatively, further changes in use patterns (such as network shifts to satellite service or demand reductions occasioned by the rate increases) suggest a need for further rate relief, we will be in a posture to review such a request in a timely fashion.

### *3. Application of COC Element in Television Service: Station Connections and Central Office Connections*

89. Tariff No. 9 divides the existing station connection rate element contained in Tariff F.C.C. No. 260 into two components: the station connection, used to *connect* a local TV channel ("central office connection and its associated access") to another local channel or an IOC at the central office;[69] and a central office connection, used to terminate the local TV channel at the central office. The COC is itself further divided into Type 1, required for each local channel terminated at the central office (whether obtained under Tariff No. 11 or as "other access"), and Type 2, used to connect the IOC element to central office functions.[70] Type 1 COCs thus purportedly reflect the separation of access from AT&T-retained functions; Type 2 COCs simply unbundle the termination function provided within AT&T's network.

90. Hughes contends its service arrangements involve only a local channel connection to an IOC, and thus should entail only a single rate element; the networks similarly assert that AT&T has failed to explain what function is performed by the COC that is not already performed by the station connection. Even if war-

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[69] The station connection element was initially proposed at AT&T's Tariff F.C.C. No. 260 rate, but was substantially increased by the March 6 revisions.

[70] The tariff lists two types of customer controlled switching arrangements as television office functions. Tariff No. 9, Sec. 11.2.4.

ranted by configurations employing "other access," the networks add, application of the COC element is not warranted if existing arrangements are continued.

91. AT&T states in its first reply[71] that the COC is access-sensitive, and recovers the cost of physically terminating local access (of whatever origin) at the AT&T central office — without regard to how often it is actually connected to an interoffice channel. The COC thus represents the simple physical connection provided for other services under the same rate element, and is said to be necessary to distinguish the local access (channel) function from the termination function, in order to reflect the demarcation drawn at divestiture and the access charge plan. AT&T concedes the COC rate element for television services differs from other private line offerings, and attributes this to the retention in the program services' rate structure of the station connection element.[72]

92. In contrast, according to AT&T, the station connection element is usage-dependent, and is utilized each occasion when a particular local access (including the associated COC) is connected to an IOC.[73] The SC element enables customers with full-time local access to connect with different IOCs on a part-time basis for specific programming purposes. We note, however, that a Type 2 COC is used to connect an IOC to an AT&T office function, while connecting an IOC with local access requires the intervention of the station connection element. This perhaps reflects that the only specified office function is a customer controlled switching arrangement, which may be a functional equivalent of the station connection, but the tariff fails to make this clear. Moreover, we are still uncertain how the COC used to connect an IOC to an AT&T premise SKYNET Television Service differs functionally from that used to connect to local access, and also what rate elements are involved in connecting an IOC to SKYNET Television Service at an AT&T premise as compared to a connection between an IOC and local access. We will require AT&T to explain (i) where in the existing Tariff No. 260 rate

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[71] This issue was not affected by the March 6 revisions, nor further addressed in AT&T's second reply.

[72] Because the amplifiers and other transmission equipment included in the COC for other services are retained in the station connection element for TV and audio program services, AT&T states, the rates for TV and audio COCs are lower in the aggregate than for other private line services that provide these components as part of the COC rate element.

[73] That station connection would also be employed to connect a local channel (access and COC) to an overseas television channel or SKYNET satellite television service.

structure the COC element — in its variant forms — is recovered; (ii) the functional difference between COC Type 1 and COC Type 2, as well as cost differences; (iii) the apparent inconsistency stated above, regarding the application of the Type 2 COC versus a station connection element; and (iv) what rate element would be used to connect an IOC with SKYNET television service, both on an AT&T premise and on a customer premise.

### *4. Termination of Series 7004 Television Service*

93. Liberty Mutual Insurance Company states that charges for its Series 7004 teleconferencing service, under AT&T's combined January 18 and March 6 revisions, will increase 350 percent, and notes that in its *March 8 Order*, the Commission suggested that many access-related cost increases would be offset by decreases in AT&T rates for interoffice channels.

94. Liberty Mutual first obtained Series 7004 service in 1980, at a monthy rate of $2,464; it has since risen to $9,033. The merger of Series 7001 and Series 7004 services by the January 18 filing, ending the anomalous situation of two functionally equivalent services being differently priced, would increase the charge to $33,698 per month. This represents the largest portion of the overall increase, and derives primarily from the effects of removing the internal disparity within AT&T's rate structure. Liberty Mutual also contends that, although AT&T offers to replace it existing service arrangements with Accunet digital transmission, at a tenth of the proposed rate to continue its existing service, this is a "migration strategy" and the Accunet alternative is not available for a year in any case.

95. Against the undisputed rate impact facing Liberty Mutual, we must weigh the benefits already obtained by this customer in the form of television service which for several years has been priced below comparable offerings in the AT&T tariff, and the effect of AT&T's failure to recover fully special access charges since January 1984. In this broader perspective, we do not believe special relief is warranted. Had Liberty Mutual ordered the Accunet T1.5 successor service when the effect of special access rate increases became evident, it would not face an extended delay in provisioning. However, we encourage AT&T to make every effort to expedite the new service, which, as Liberty Mutual concedes, will greatly mitigate its rate burden. As to the prospect of termination liability charges, should Liberty Mutual decide not to accept the AT&T alternative, the customer is free to request relief from the termination liability obligation, whether by negoti-

ations with the carrier or by formal complaint to the Commission.

### *D. Tariff-Specific Issues: Tariff No. 10*

96. The divergence between rate center pricing in Tariff No. 11 and serving wire center pricing and adopted by the LECs creates a practical difficulty beyond the structural inconsistency discussed at paras. 101–103. When distance-sensitive rate elements are priced by divergent mileage regimes, comparisons are inherently compromised; but importantly, the information necessary to make the actual comparison may not be available in either tariff. The same unbundling of rate structures that enables comparison of equivalent functional capabilities can thus obstruct the calculation of actual charges when the alternative tariffs employ different regimes. In the present context, as commenters note, comparison of AT&T rates for service provided under Tariff No. 11 (as originally filed) with LEC rates was not initially possible: neither tariff regime contains the information needed to determine which serving wire center (SWC) is associated with a particular AT&T central office.

97. Under the LEC regime, customers obtain termination channels from their designated premises to the SWC serving those premises, and channel mileage between SWCs. Thus, to compare AT&T charges under Tariff No. 11 with charges from an LEC, the customer must determine the specific SWC for the AT&T central office (which is a customer-designated premises). Absent this information, the customer cannot determine charges between its designated premises and the AT&T central office. The standard procedure for assignment of SWCs is to look up the customer station's NXX code, determine the assigned SWC, and ascertain the SWC's location coordinates for mileage measurement. As originally filed, however, AT&T's central office listings in Tariff No. 10 did not include NXX codes associated with those offices — and AT&T stated in its Reply II that it does not consider itself bound to provide such information, which indeed is not needed to determine rates under AT&T's tariffs.

98. Such information, however, is essential to a comparison of the AT&T and special access tariffs. The Commission staff informally advised AT&T that, whatever the independent merits of its rate structure revision, the inability to implement rate comparisons could seriously compromise the open interconnection terms of its proposal. Recognizing the inefficiency of requiring numerous LECs to provide this information, AT&T has supplied SWC V&H coordinates for its central offices listed in Tariff No.

10. Customers will thus be able to compare offerings, so that the restructure's improvements in this respect can be realized.

### *E. Tariff-Specific Issues: Tariff No. 11*

#### *1. Complexity*

99. In addition to Tariff No. 11's departure from the central office pricing adopted in Tariff No. 9, customers contend that the steps necessary to determine the cost to the customer of offerings under Tariff No. 11 and compare them with LEC counterpart offerings, particularly where complex multipoint services are involved, are complex and unnecessarily burdensome. Dow Jones, for example, states that its only alternatives for a full-fledged rate comparison are development of a computer program or reliance on AT&T estimates.

100. The Commission is concerned by the conceded complexity of this comparative process; hence our imposition of the requirement that AT&T adopt serving wire center pricing in Tariff No. 11 within six months. The interim structure, we believe, while admittedly not perfectly consistent with either Tariff No. 9 or the underlying special access tariffs,[74] represents the best attainable compromise. As discussed below, the Tariff No. 11 structure has been substantially improved; some aspects of its complexity indirectly reflect the carrier's reasonable responses to customer demands that alternative service configurations be more accurately reflected by rate elements. Given the complexity of multipoint circuits in particular, the burdens confronted by Dow Jones and others simply reflect the decisional responsibility confronted by all actors in an evolving environment that more closely approximates a competitive market.[75] Customers — espe-

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[74] Special Access tariff structures may diversify somewhat in future filings, so that AT&T could not be reasonably required to mirror all underlying LEC rate structures in any case. The requirement that its structure comport with the SWC approach of the majority of LECs will resolve the broader discontinuities.

[75] The complexity which Dow Jones and other customers cite as an obstacle to comparative pricing of multipoint circuits supports our tentative view that the provision of multipoint circuits may more closely resemble custom-engineered private networks than a generic private line offering, at least for the larger, more complex circuits. We do not consider here the pricing issues that would arise from such a determination, but neither do we wish to convey the impression that such questions are unimportant. It may be that simpler multipoint circuits and more complex arrangements are so different as not to warrant the application of identical pricing regimes. In any case, the Commission's acceptance of AT&T's response to customer concerns respecting the availability of LEC bridging should not be interpreted as a conclusion that the multipoint service could not benefit from closer scrutiny by the carrier, to identify fully and allocate the disputed complexity costs. Customers should

cially sophisticated commercial entities — are expected to assess their alternatives and choose between them. This process should be made easier by the adoption of SWC serving wire center pricing, but it remains the customer's responsibility.

### 2. *Pass-Through of Special Access Structure*

101. Until the Commission's *November 9 Order*, AT&T contends, it expected to confront the necessity of passing through a rate center-based special access tariff structure. The Commission's endorsement of a serving wire center regime for LEC's tariffs left AT&T unprepared to implement a pass-through of such pricing in Tariff No. 11: AT&T faced the necessity of developing appropriate internal billing mechanisms, and of identifying some 900,000 terminations by SWC and customer. Tariff No. 11, therefore, as an interim measure prices AT&T's local channel offerings between rate centers rather than by the SWC-based regime used by the LECs. Numerous commenters assert that this divergence between Tariff No. 9 and Tariff No. 11 violates the rate structure guidelines, and that the divergence between Tariff No. 11 and the underlying special access structure also obstructs efficient comparison of alternative service configurations.

102. AT&T recognizes the structural dichotomy, and has stated its intention to implement SWC pricing in Tariff No. 11 in the near future. By remedying this discontinuity, AT&T will be less exposed to potential arbitrage of these channels.

103. The proposed structure, as revised, does permit comparison of the two alternative service configurations, and this alone is a major step forward. We also believe that AT&T has undisputed incentives to implement SWC pricing within Tariff No. 11, for its own economic interest and the longer-run goals of eliminating superfluous regulatory oversight. At the same time, we are concerned that this structural discontinuity significantly complicates the process of rate and service comparisons between the available alternatives. Even with the V&H coordinates recently supplied by AT&T in its revisions to Tariff No. 10, the underlying structural advantages of AT&T's proposal are compromised by the several stages of calculation necessary to compare service components obtained under Tariff No. 11 with the alternative directly available from the LECs. However, we recognize the

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recognize the present structure (whether priced between rate centers or, shortly, between serving wire centers) is not cast in stone. Indeed, AT&T has described diminished private line use by some large customers whose explorations of alternatives commenced after the October 1983 filing of Tariff No. 3.

administrative obstacles confronting a better structural alignment.[76] Apart from the difficulties cited by AT&T, it is not yet clear to what extent the alternative mode of obtaining local channels will be immediately available from the LECs.[77] While imposing a requirement of immediate rate structure parallelism, even if arguably possible, would divert AT&T efforts better devoted to the practicalities of coordinating post-divestiture service, and might even outrun the capability of the several carriers to implement such changes, we do not believe that resolving this deficiency should be left to the carrier's priorities. It is our view that AT&T should be capable of implementing SWC pricing in Tariff No. 11 wihin six months of the release data of this Order, and expect that it will do so absent compelling circumstances. We will require an interim report, 90 days after release of this Order, on progress toward that result.[78]

### *3. Intra-Rate Center and Inter-Rate Center Pricing of Local Channels*

104. The use of rate center pricing in Tariff No. 11 represents a substantial departure from the central office pricing regime in Tariff No. 9. Beyond this, however, commenters contend that AT&T's use of a flat-rate mileage element for intra-rate center local channels and a mileage-sensitive element for inter-rate center local channels fails properly to reflect the underlying special access tariff structure (which consistently employs a mileage-sensitive component for all transmission between SWCs).[79] With specific regard to the intra-RC element, AP/CNS contend that because some stations have the same serving wire center as AT&T's central office, no channel mileage is provided. Several

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[76] It could also be argued that the provision of SWC V&H coordinates in AT&T's tariff is not technically necessary for the pricing of services under its tariff, and that obtaining information necessary to compare LEC and AT&T alternatives is the customer's responsibility. We need not reach this issue due to AT&T's willingness to provide the information, and facilitate such comparisons via this interim method.

[77] Pacific Telephone, for example, has urged in its second round comments that the flexibility inherent in this proposal be denied, stating its preference for avoiding the administrative burdens that requests for directly provided LEC service under the AT&T structure will generate.

[78] We emphasize that this requirement arises from the circumstances of this case. Absent such refinement of the AT&T structure, its potential benefits would remain seriously compromised.

[79] A channel between two rate center areas usually entails channel mileage under the LEC structure, because each rate center area probably contains a serving wire center. Rate center areas containing multiple SWCs raise the prospect of applying channel mileage to channels within a single rate center area.

parties also contend that the inter-RC element create pricing anomalies within particular states.[80]

105. The intra-RC element, compromising a flat-rated mileage component, inherently cannot reflect each individual circuit configuration. The component does, however, account in the aggregate for colocation of AT&T central offices and LEC serving wire centers, just as it accounts for circuits involving greater than average mileage. It is not unreasonable, on an interim basis, to apply average mileage charges on this basis, and the subsequent shift to serving wire center pricing will recognize these differences more precisely.[81]

106. The anomalous pricing results noted for particular inter-RC channels by several commenters derive, according to AT&T, from the distinctive patterns of central office and population dispersion in individual states. AT&T asserts, for example, that New Mexico, because of the comparatively large rate center areas more commonly found in rural states, has 67 percent of all stations in the same rate center as the associated AT&T central office. Of the remaining stations, 27 percent are over 50 (rate center-based) miles from the AT&T central office, and these account for 95 percent of the total inter-RC channel miles. The cited "distortions" also involve a minuscule percentage of AT&T's nationwide voice grade private line stations (2.5 percent of such stations are spread across Idaho, New Mexico, and Washington), and comparable oddities are not presented for more populous urban areas such as Chicago or New York.[82]

107. The imperfections noted in comments establish that AT&T's prososal fails to price circuits on a basis that fully mirrors individual circuit mileage. The interim structure nonethe-

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[80] The divergence in rates between different states, of course, simply reflects the underlying differences in special access rates charged by LECs in those states.

[81] SWB also contends that a "small sampling" of intra-RC local channels in Texas indicated that AT&T's average mileage component for more competitive, high-technology services (1.544 Mbps, DDS) is significantly lower than for more traditional services such as voice grade and telegraph offerings. On the record before us, it does not seem unreasonable to suppose — especially in light of the larger rate center areas common in rural states — that more sophisticated services would be ordered by businesses clustered near central offices, while traditional service offerings would include a greater number of more distant customers. In any case, the recasting of Tariff No. 11 to SWC pricing will resolve SWB's concern over potential subsidies of competitive service offerings.

[82] Apart from the anomalies reflecting the size of rate center areas and population dispersion in particular areas, commenters have also identified infrequent instances in which AT&T's local channel rates are less costly than the underlying special access charges imposed by LECs. (*E.g.*, SWB Petition to Suspend, at 3). Occasional instances of such rate asymmetry, in light of the imperfect interim structure involved here, appear almost inevitable.

less would establish compromises that are not unreasonable. The carrier is not required to propose the best structure to deal with the complicated underlying variables of circuit provisioning, but only to establish a regime that avoids unreasonable discrimination. The regime proposed to recover special access charges under Tariff No. 11 does not appear to impose unjustified burdens on particular customers or groups. As stated in more general terms elsewhere, we believe a more expeditious resolution of these difficulties will be obtained by requiring a shift to serving wire center pricing, than by diverting Commission and carrier resources to a short-term effort to recast this proposal.[83]

### *4. LEC Bridging*

108. As a central aspect of the revisions filed under Transmittal No. 318, AT&T proposed four new local channel elements — elements conceived to recognize the presence of bridging provided at LEC serving wire centers. The new channel elements are described above at para. 15. As they may involve single or multiple rate centers, the bridged channel and inter-bridge channel are each priced and provided as intra-RC or inter-RC channels, in common with local channels generally. The use of such remote bridges (*i.e.*, outside the AT&T central office) at present constitutes less than 15 percent of all multipoint bridging, according to AT&T. The carrier also contends, and is supported in this by Reuters, that the greatest reliability and quality of service is obtained by bridging such circuits in AT&T offices, and states that this is reflected in the existing distribution pattern of the bridging function.[84] As rates for the alternative multipoint circuit configurations become more closely aligned with costs, however, some customers may determine that a cost saving justifies accepting the lower performance standard; AT&T's revisions enable customers to implement that decision.[85]

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[83] We need not reach the issue whether these structures would be acceptable indefinitely, given our instructions to the carrier.

[84] AT&T has stated, in Reply II at 19, that after detailed review of engineering records underlying multipoint circuits is completed, it will be able to correlate charges imposed precisely with actual service configurations. We expect that, where a customer's configuration is found to involve less expensive arrangements than were billed for in the interim, AT&T will refund the difference.

[85] The use of such configurations was not entirely precluded by the original filing, but customers desiring LEC bridging were limited to obtaining the local access function under the "other access" category — and the access coordination function was available from AT&T only for circuits bridged at its central offices. Customers accurately perceived that this higher-quality, higher-priced arrangement could be replaced in some circumstances with the LEC-bridged alternative, and urged this revision in their first round comments.

109. The rate advantages of remotely bridged circuits arise from the reduction in circuit components and termination charges, but there are corresponding functional consequences as well. AT&T must coordinate trouble isolation and service restoral with an LEC employee at the SWC, rather than diagnosing such problems entirely from its own central office; in addition, the interposition of SWCs and related circuit reconfiguration tends to involve different circuit mileage, as discussed at paras. 112–113.

110. AP/CNS complain that the revisions establish an "artificial" alternative. Although AT&T now proposes to price bridged circuits to reflect their physical configuration, AP/CNS characterize this change as "forcing multipoint customers to bear the costs of AT&T's inefficient circuit configurations." This represents a sufficient misconception of the alternatives, as we understand them, that it requires correction. The emphasis on AT&T office bridging evident in installed multipoint circuits apparently reflects the interest of customers, in a period when rate structure averaging tended to suppress the costs of engineering complex multipoint circuits, in obtaining the highest possible service quality. The "inefficiency" that AP/CNS and other commenters now decry does represent a departure from the least-cost alternative now being made available, but as noted, the least-cost alternative entails functional differences as well. Efficiency, in short, is not solely a matter of routing configurations. AP/CNS have not denied there is a difference in the quality of service provided under these alternate arrangements, nor do these parties state their intent to reconfigure circuits to rely more heavily on LEC bridging. In effect, AP/CNS demand continued provision of the premium service at artificially suppressed rates, because the carrier "forced" the present configuration on customers.

111. We seriously doubt that AT&T historically compelled customers to accept premium multipoint service configurations when no corresponding rate premium was recovered. In any case, whatever incentives or past decisions occasioned the present circuit arrangements, it is clear there are real cost differences that attend the decision to configure circuits with SWC or LEC bridging. The fundamental trade-offs to be considered are for customers to evaluate, but to compel AT&T to price circuits bridged at its central offices as though they were bridged at serving wire centers would be to impose on the carrier precisely the type of artificial rate structure distortion that this Commission has so often criticized.

### *6. Effect of Remote Briding on Bundled Mileage in Local Channel Element*

112. AT&T initially structured its flat-rated intra-rate center local channel element, as described above, to include an averaged mileage component. When AT&T initially developed its average mileage component for such circuits, the calculation was predicated on the absence of remote bridging points. Several multipoint customers now contend that the intra-RC bridged channels made available to them by Transmittal No. 318 result in an over-recovery of these bundled mileage charges.[86] The carrier's recognition of remote bridging points in fact has competing effects: it removes the necessity to obtain separate circuits from each customer station to the AT&T central office, the usual configuration which maximizes AT&T's testing and supervision capabilities, and which some multipoint customers candidly recognize is necessary to maintain the service quality they prefer. *See, e.g.*, Reuters comments on revisions at 4–5. At the same time, provision of the LEC bridging function entails routing circuits to an LEC serving wire center, which may not be necessarily located on the most direct route to the AT&T office. Indeed, the more local circuit "legs" are bridged, the more probable is their routing away from direct paths in order to bridge at a SWC.[87]

113. As an initial matter, the averaging of channel mileage in bridged circuits does not intrinsically operate for or against individual customers or circuits. The implementation of serving wire center pricing, while more precise in this respect, is not immediately practicable. In the interim, it is reasonable for AT&T to maintain the averaged mileage component originally included within the general intra-rate center channel for the bridged channel variant. The overall charges for such circuit configurations are significantly reduced. The local channel elements recognizing LEC bridging reasonably recognize cost savings in diminished terminations; they also reasonably recognize circuit-struc-

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[86] The contention is also made that, as a result of this over-recovery, the revised structure establishes disparate charges under inconsistent rate structures for functionally equivalent circuits.

[87] Commenters have assumed that a bridged circuit is provided without a mileage penalty — in effect, they conceptually interpose the LEC bridging capability on a hypothetical straight line between the customer station and the AT&T central office. In fact, the determination to route circuits to an LEC bridge and thence to the AT&T office will often require that less direct routing be employed in order to include the LEC bridge in the circuit. The underlying provisioning of such circuits runs directly counter to the suggestion by AP/CNS that the bundled mileage component should be halved to reflect the inclusion of an LEC bridge in the circuit.

ture effects that tend to add mileage. Customers' rate and service alternatives have both been expanded by AT&T's revisions recognizing remotely bridged channels.[88]

### *7. Application of Unbundled ACF Element*

114. One effect of establishing the access coordination function as a separate rate element is that the newly unbundled ACF applies to individual station terminations, rather than to local channels.[89] This aspect of the unbundling has practical rate consequences, however, only for circuits with remote bridging, as the interposition of the LEC bridge for the first time creates a distinction between the number of station terminations and the number of circuits. Several commenters assert that the application of the ACF function on a per-termination basis amounts to over-recovery of the costs incurred by AT&T in providing the functions under this element.

115. The access coordination functions, as we understand them, involve no physical provisioning of components. Rather, they involve design, testing and coordination of the physical installation of access, and the ongoing responsibility to test, sectionalize trouble, and turn service back to customers when trouble is cleared. These functions are provided, between the AT&T central office and the customer premise, for each termination point, and, if LEC bridging is involved, entail the additional involvement of LEC personnel for coordination of trouble isolation and service restoral. While the remote bridging of local channels does reduce the number of terminations *in the AT&T office*, it does not affect the number of *customer station terminations*. It therefore does not appear that the access coordination functions actually performed are reduced as a result of LEC bridging; indeed, the interposition of the LEC bridge may in fact impose additional costs. Pending the completion of our investigation into the finer points of the access coordination and central office connection elements, the application of ACFs on a termination basis seems

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[88] Customers are, of course, free to obtain such bridged circuits directly from the LECs, under tariffs not employing bundled mileage charges, if that alternative is more attractive. This unrestricted alternative can be conjoined with AT&T's access coordination and other elements for a functionally equivalent offering. We will also monitor the confluence of customer requests (and AT&T's acceptance) for alternative service configurations utilizing the ACF.

[89] Under the original proposal, whether access channels were obtained under Tariff No. 11 or directly from the LEC, a single ACF element would have been included — as part of the local channel, if obtained under Tariff No. 11; or as part of the Type A central office connection, if the customer had ordered access directly from the LEC.

more reasonable than a regime that artificially ignores the complexity of circuits implemented by LEC bridging. In this respect, assessing the ACF element on a per-termination basis simply reflects the number of terminations that AT&T undertakes to coordinate. Customers are free to provide the ACF independently if that approach holds the potential for cost savings. Finally, as both central office connections and the interoffice channels are available separately from the ACF, a separation central to consistent unbundling of the rate structure generally, it would contradict the rate structure guidelines as well as the underlying realities of provisioning to rebundle the ACF into the IOC rate element, as some commenters urge.

## *V. SUMMARY OF ACTIONS*

### *A. Reporting Requirements*

116. As stated, the proposed rate structure generally complies with the private line rate structure guidelines. To facilitate a smooth transition in the post-divestiture environment, we will require the carrier to report on several aspects of operations under the new structure, so that alternative approaches can be considered. We will require AT&T's adoption of serving wire center pricing in Tariff No. 11, to improve this interim structure.

117. AT&T should provide monthly reports commencing June 1, 1985 on requests for technological bypass involving connections at its central offices and the results of such inquiries, including service orders. When an arrangement is agreed to with an alternative access supplier, AT&T should submit a copy of the agreement involved.

118. AT&T should provide monthly reports, commencing June 1, 1985, for the next year on provisioning arrangements with local exchange carriers, and any service difficulties encountered under these arrangements. The reports should separate arrangements involving directly obtained LEC access ("other access"), from those involving arrangements configured with Tariff No. 11 services ("local channels") and customer-provided access ("alternative access") and specify the extent to which each arrangement is utilized to access public switched network offerings in Tariff Nos. 1 and 2. The carrier should also separately report instances in which it has refused to configure service arrangements as requested by a customer and the grounds for such decisions. AT&T should also report complaints involving the failure of

provisioning synchronization, as noted in paras. 62–64.

119. AT&T should report on the utilization of LEC-provided special access circuits kept as "local channel" inventory, in 90 days from the effective date of this Order. We are particularly concerned that AT&T report (i) the extent to which access arrangements are obtained by AT&T from LECs, and directly by customers; (ii) the extent to which AT&T-obtained access circuits are connected at the voice grade level and at levels involving more than single paired-cables circuits (*e.g.*, 1.5Mbps); and (iii) the fill factor attained by AT&T on higher bandwidth circuits.

120. AT&T should report in 90 days from the effective date of this Order progress made toward implementation of serving wire center pricing in Tariff No. 11.

121. AT&T should report in 120 days from the effective date of this Order; part-time and full-time terrestrial television channel usage (billed mileage hours and billed channel mileage months, respectively) under Tariff No. 260 since January 1, 1985, by month; and usage for the first 90 days of Tariff No. 9, by month. The reported usage in each period should be compared with (i) actual usage in 1984, by month; and (ii) 1985 demand projections, by month, used to develop the projections in Transmittal Nos. 285 and 318.

### *B. Investigations*

122. Our subsequent investigation order will examine:

(a) The extent to which the revised rate loadings on IOC mileage bands can be supported by AT&T;

(b) The reasonableness of nonrecurring charge levels, the extent to which these costs are recovered in part through recurring charges, and the desirability of replacing a unitary NRC element with NRCs more closely aligned with underlying functions;

(c) The extent of overlap between ACF and COC functions; and

(d) The disparate COC and DLC elements present in DDS, and the relationship between COC and SC rate elements in the television service.

123. Accounting orders will be imposed as delineated in paras. 126–128.

## *VI. CONCLUSION*

124. The proposed restructure of AT&T's private line services leaves significant room for further improvement, but nonetheless represents a major improvement over past proposals. As with the special access tariffs, we have reached the point in this context

that experience with a substantially sound structure is far preferable to continued abstract analysis. With the further information expected from the investigation of remaining questions, and reports from the carrier on the implementation of newly available service configurations, we expect customers will benefit increasingly from expanded, unrestricted service alternatives. At the same time, we believe our oversight of the process will provide prompt notice should unexpected difficulties arise. The progressive development of a more transparent private line rate structure will continue, but these tariffs, as they stand, represent a major step toward more freely competitive offerings by the dominant carrier.

## *VII. ORDERING CLAUSES*

125. Accordingly, IT IS ORDERED that pursuant to Sections 4(i), 4(j), 201-205 and 403 of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), 201-205 and 403, an investigation of the issues set forth in this Order IS INSTITUTED.

126. IT IS FURTHER ORDERED, pursuant to Section 204(a) of the Communications Act, 47 U.S.C. § 204(a), that the American Telephone and Telegraph Company keep accurate account of amounts received under its Interstate Private Line Tariff F.C.C. Nos. 9, 10 and 11 until further Commission Order.[90]

127. AT&T shall keep accurate account of amounts received under its interstate tariffs (telegraph, voice grade, DATAPHONE Digital Service, Accunet T1.5, Program Audio, Television and Group/Supergroup (wideband) as follows:

- Tariff F.C.C. No. 9
  - A. Nonrecurring charge elements for central office connections, additional administrative and operational functions, station connections (for terrestrial televisions and audio services)
  - B. Recurring charge elements for:
    - Interoffice channels

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[90] Accounts need be kept only by the categories enumerated in the text, with the exception of television rates for customers in Bell Atlantic territory, where television special access rates have not been filed. In general, we do not believe the considerable burden of accounting by individual customer is warranted by the issues remaining to be resolved. Unreasonable discrimination between individual customers or groups is not the primary focus of our investigation but the prospect of more general, residual imprecision in the rate structure. If such deficiencies are determined to exist as a result of investigation, we expect adjustment of charges by rate element will be sufficient to remedy such shortcomings.

- Central office connections
- Station Connections (for TV and radio)

— Tariff F.C.C. No. 11

A. Nonrecurring charge elements for:

- Digital data local channels types 1 and 2
- All rate elements which have accounting orders attached in the special access tariffs from which AT&T obtains these underlying facilities[91]
- Additional administrative and operational functions
- The Access Coordination Function

B. Recurring charge element for:

- Digital data local channels types 1 and 2
- All rate elements which have accounting orders attached in the special access tariffs from which AT&T obtains these underlying facilities
- Additional administrative and operational functions
- The Access Coordination Function

— Tariff F.C.C. Nos. 9 and 11

Revenues, by customer, collected for notices of discontinuance for all services for which such charges apply

128. AT&T shall also keep accurate separate records of full-time and part-time terrestrial television demand for the period of January 1, 1985 to August 31, 1985 on a monthly basis.

129. IT IS FURTHER ORDERED, that the American Telephone and Telegraph Company must submit the reports as described herein and in the forthcoming Investigation Order.

130. IT IS FURTHER ORDERED, pursuant to Section 5(c) of the Communications Act, 47 U.S.C. § 155(c), that the Chief, Common Carrier Bureau, is hereby delegated authority (i) to conduct this investigation; and (ii) to delineate the reporting procedures.

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[91] This is not duplicative. AT&T may receive refunds from the LECs as a result of special access actions, but as it does not necessarily use circuits obtained from the LECs without channel derivation or other transformation, it should be required to keep track of its customers using LEC facilities. While AT&T orders facilities under the "other access" configuration, the LEC bills the customer directly and the underlying special access accounting order is sufficient to protect users in this situation.

131. IT IS FURTHER ORDERED, that the petitions for rejection and suspension and investigation filed by parties listed in Attachment A are DENIED IN PART and GRANTED IN PART, as described herein.

132. IT IS FURTHER ORDERED, that the late-filed petitions of television service users, and the comments of Shaw Data Services, described in note 13, ARE DISMISSED.

133. IT IS FURTHER ORDERED, that this Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

April 26, 1985

## *STATEMENT OF COMMISSIONER HENRY M. RIVERA DISSENTING IN PART*

RE: AT&T COMMUNICATIONS Tariff F.C.C. Nos. 9, 10 and 11 (Transmittal Nos. 285, 318, 342 and 346) — AT&T Private Line Tariffs.

For the same reasons I articulated elsewhere,[1] I dissent to that portion of the majority's opinion that allows the non-recurring charges (NRCs) proposed in the subject tariff despite wholly inadequate cost support.[2] Unfortunately, my colleagues seem to be making a habit of this indulgent approach to the tariff review process.

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[1] Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Phase I and Phase II, Part 1, FCC 85-100, released March 8, 1985 (Dissenting Statement of Commissioners Mimi Weyforth Dawson and Henry M. Rivera).

[2] The majority, at para. 39, concedes the serious cost justification deficiencies of AT&T's proposed NRCs:

> [W]e are unable to associate specific NRCs with a generic cost factor or factors. Nor are we able to determine the extent to which AT&T recovers these costs from cost causers or from ongoing charges incurred by all users. In the proposal before us, we cannot fully delineate which functions are covered by certain charges and where coverage of other functions begins . . . .

**Common Carrier, Rate or Tariff, Unlawful**
**Message Telecommunications Service**
**Tariff, Cost Support Material**
**Tariff, Discrimination**
**Tariff, Investigation**
**Tariff, Just and Reasonable Charges**

**Order found AT&T Communications' tariff revisions, proposing to implement an optional calling plan called PRO America, to be noncompensatory and, therefore, unlawful.**
***—AT&T Communications***
**CC Docket No. 85-128**

FCC 85-510

## BEFORE THE

# FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

| | |
|---|---|
| In the Matter of | CC Docket<br>No. 85-128 |
| AT&T Communications Tariff F.C.C. No. 1 | Transmittal<br>No. 301 |
| PRO America Optional Calling Plan | |
| Alascom, Inc. Tariff F.C.C. No. 1 | Transmittal<br>No. 313 |
| Block-of-Time Call America | |

## MEMORANDUM OPINION AND ORDER

Adopted: September 18, 1985; Released: September 30, 1985

BY THE COMMISSION: COMMISSIONER QUELLO CONCURRING AND ISSUING A SEPARATE STATEMENT.

## I. INTRODUCTION

1. On February 12, 1985, AT&T Communications (AT&T) filed revisions to its MTS tariff that were scheduled to become effective May 1, 1985. Those revisions were designed to implement on optional calling plan called PRO America. Alascom, Inc. (Alascom) also filed revisions to incorporate the same optional calling plan in its tariff.[1] On April 26, 1985, the Commission adopted an Order[2] instituting an investigation into the lawfulness of the proposed tariff revisions pursuant to Section 204 of the Communications Act, 47 U.S.C. § 204, and suspended their effectiveness for the full statutory period. For the reasons discussed below, we find that there is insufficient data in the record developed in this investigation to show that the PRO America offering would be compensatory in 1986 or 1987, and that the proposed PRO America tariff is, therefore, unlawful. We will therefore require that AT&T and Alascom withdraw their proposed tariff revisions filed under Transmittal Nos. 301 and 313, respectively.[3]

## II. BACKGROUND

2. PRO America is targeted to customers with monthly bills of at least $167 (*i.e.*, monthly usage exceeding approximately six hours). Under the plan, a customer would pay a monthly charge of $25 and receive a 15 percent discount on all domestic interstate MTS dial station calls per main billed account. The discount would apply during all rate periods and would be calculated by discounting the customer's total MTS interstate dial station bill. Numerous petitions to reject or suspend and investigate were filed against PRO America, challenging both the reasonableness and adequacy of the data and assumptions underlying the filing. Petitioners claimed that PRO America is noncompensatory and that AT&T attempted to mask this fact by overstating projected revenues and understating costs. AT&T contended that while PRO America would not recover all its costs in 1985, the plan would be sufficiently profitable to cover all of its costs by 1986, including 1985 start-up costs.

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[1] These optional calling plans will be described as "PRO America" in this Order.

[2] AT&T Communications, CC Docket No. 85-128, Memorandum Opinion and Order, FCC 85-128 (released May 2, 1985) (*Investigation Order*).

[3] Alascom's plan has not been analyzed separately because it essentially adopted the rate structure and provisions of AT&T's proposed tariff in accordance with the Commission's policy of partial rate integration with respect to the Alaska market. *See* CC docket No. 83-1376, Memorandum Opinion and Order, FCC 84-616 (released Dec. 11, 1984).

3. In the *Investigation Order* the Commission concluded that an investigation is necessary because the proposed changes might result in below cost pricing that would violate the Section 201(b) prohibition of unjust and unreasonable charges and the Section 202(a) prohibition of unreasonable discrimination. 47 U.S.C. §§ 201(b), 202(a). Although we agree that an offering should not be declared unlawful merely because it fails to generate a profit in the initial year, we concluded that "deficiencies in AT&T's cost support data, particularly with respect to AT&T's demand estimates make an investigation necessary".[4]

4. AT&T assumed a price elasticity of -1.5 for PRO America, which it estimates would stimulate a 28 percent increase in demand.[5] It stated that a high price elasticity for PRO America is consistent with the highly competitive nature of its target market. At the same time, however, AT&T assumed there would be no competitive response to this offering. This apparent contradiction seemed to undermine the reasonableness of AT&T's projection of stimulation effects. AT&T's demand estimates appeared to be further skewed by failing to differentiate between new traffic stimulated by the plan and traffic that would be lost to competitors in the absence of this offering.[6] The *Investigation Order* noted a similar problem with respect to AT&T's forecast of access costs. Its aggregation of new traffic and traffic captured from competitors raised questions as to whether stimulated demand would drive per unit non-traffic sensitive (NTS) costs down as far as claimed.

5. It also appeared to us that AT&T was attempting to boost its claim of profitability for PRO America by understating potential revenue loss in two respects. First, AT&T may have understated the cross-elastic effects of WATS so as to minimize revenue loss for the message service category overall. Second, AT&T's assumptions regarding revenue generated by PRO America and average number of customers joining PRO America each year suggested that the average monthly bill size assumed by AT&T may be unreasonably below or close to the break even point of $167. Because revenue dilution increases as customer size increases, AT&T had an incentive to understate average bill size.

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[4] *Investigation Order*, at para. 22.

[5] By way of reference, MCI Telecommunications Corporation (MCI) noted that, according to AT&T's own Rate Evaluation System (RES) documentation, the appropriate elasticity for an MTS rate change is in the -0.74 to -0.9 range, depending on whether there is any change in WATS or competitors' prices.

[6] The latter category would not consist of "new" traffic, but rather existing traffic which AT&T claimed it would retain.

Moreover, by assuming a smaller bill size, AT&T would be able to show a greater number of PRO America customers and thus a larger amount of revenue generated by the fixed monthly charge.

6. Given the inadequacy of the data and the questions raised by many of the assumptions underlying the filing, we directed AT&T to respond to a series of investigation questions which were designated in the *Investigation Order.*[7] These questions essentially required AT&T to substantiate further its assumptions and provide additional cost support data. AT&T filed its response to the investigation questions on June 3, 1985. Reply cases were filed on June 18 by GTE Sprint Communications Corporation (GTE Sprint), MCI, US Telecom, Inc. (US Telecom), Lexitel Corporation (Lexitel), TDX Systems, Inc. (TDX), Alascom, Ad Hoc Telecommunications Users Committee (Ad Hoc), and a joint filing was made by Competitive Telecommunications Association, United States Transmission Systems, Inc. and Satellite Business Systems (Joint Parties).[8]

## *III. SUMMARY OF AT&T'S RESPONSE*

7. AT&T prefaces its specific responses by stating that while neither its model nor market research can calculate with absolute precision how customers will respond to a new offering, they nevertheless demonstrate that the direction of PRO America's profitability is clearly positive. The imprecision inherent in forecasting demand seems to manifest itself in AT&T's response regarding the derivation of its elasticity estimate of -1.5 (or -1.48, as AT&T states more precisely in its response). It asserts that based on inputs which have been updated since PRO America was filed, the RES model now yields an elasticity of -1.41. AT&T further states that when cross-elasticity with WATS is taken into account (assuming no change in WATS prices and no competitive response) the elasticity drops to -1.09. AT&T Response at 25-26.

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[7] *Investigation Order* at para. 27.

[8] Also before the Commission is a petition for clarification filed by General Communications Incorporation (GCI). Oppositions to this petition have been filed by Alascom and AT&T. GCI requests that the Commission clarify the Investigation Order to indicate that if GCI's application for review of AT&T's Block of Time optional calling plan for southbound MTS services are not acted upon prior to October 1, 1985, the application of PRO America to northbound MTS services to Alaska and Alascom's parallel plan for southbound calls from Alaska will be deferred until the Commission acts upon those pleadings relating to the Block of Time plan. In light of the action we take here, GCI's request is moot.

8. Assuming that the other common carriers (OCCs) do respond with a matching 15 percent price cut to their business direct dial customers, AT&T claims that the elasticity will be -1.05 and that PRO America will remain profitable at this level. This claim notwithstanding, AT&T continues to maintain that there will be no competitive response since current OCC rates are lower than those proposed for PRO America. Depending on the volume of calling, AT&T states that the OCC price differential would range between 5 percent and 20 percent. AT&T Response at 49-51.

9. In explaining the development of its churn factors (*i.e.*, the number of PRO America purchasers who would discontinue the plan after buying it), however, AT&T does allow that the cross-elastic effects of other AT&T services as well as competition will cause the rate of churn to increase. It estimates the churn factor to be 5 percent in 1985 and 1986 and 10 percent in 1987. AT&T states that it based these estimates on its experience with Advanced 800 Service because, like PRO America, that service is relatively new, offered as an option to an existing service, designed for the business market and involves both nonrecurring and monthly recurring charges. AT&T Response at 33-35.

10. Based on its elasticity coefficient of -1.5, AT&T calculates that PRO America will result in 122.6 million minutes of stimulation to business direct dial traffic in 1985. Of this total, it states that 34.7 percent is gained from WATS, 36.2 percent is pure stimulation and 29.1 percent is gained from the OCCs[9] or represents traffic that would otherwise be lost to the OCCs.[10] AT&T Response at 47.

11. Taking into account the offsetting effects on WATS and OCC services, AT&T asserts that PRO America volumes will stimulate total telecommunications industry weighted minutes of use by .2 percent in 1986 and by .25 percent in 1987. Consequently, because a change in industry demand results in a change in the NTS unit cost, AT&T states that the unit NTS access cost for all minutes will be reduced by .13 percent in 1986 and by .24

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[9] According to AT&T this calculates to 35.7 million minutes gained from the OCCs which at 35.7 cents per minute (42 cents per minute—the 1985 interstate business dial base associated with PRO America purchasers prior to reprice—multiplied by .85 to reflect the 15 percent discount) yields revenue gained from the OCCs of approximately $13 million.

[10] In a related response, AT&T estimates that, according to the Tariff Filing Reference View (TFRV) it filed in January 1985, revenue losses due to competition are $1.041 billion in 1984 and $1.264 billion in 1985. AT&T Response at 46.

percent in 1987. When the NTS cost savings are flowed through to PRO America, according to AT&T, the per minute NTS access costs of new minutes will effectively be reduced by about 54 percent in 1986 and about 76 percent in 1987. AT&T further notes that even assuming no reduction in unit access costs due to demand stimulation, PRO America would still be profitable. AT&T Response at 44.

12. As to the reasonableness of its assumptions regarding average[11] customer bill size, AT&T explains that customers who would have pre-purchase dial station bills below or close to the $167 cutover point may also be using an OCC for a significant portion of their calling needs.[12] AT&T reasons that those customers who also use a competitor would switch at least some of their OCC usage to PRO America since their overall usage requirements do in fact exceed $167. AT&T also notes that the RES model used to quantify demand for PRO America does not differentiate between a customer with $100 of AT&T usage and no OCC usage, and a customer with $100 of AT&T usage and $300 of OCC usage. AT&T Response at 11-12. With respect to post-purchase bill sizes, AT&T contends that the average monthly bill will be $282 in 1985, $240 in 1986 and $206 in 1987 — all well above the $167 cutover point. AT&T Response at 15-18.

13. To substantiate further its claim that its average bill size estimates are reasonable, AT&T cites its experience with the Reach Out America (also known as Block of Time) optional calling plan. According to AT&T that experience indicates that relatively low usage residential customers significantly increase their usage after they purchase the plan.[13] AT&T concludes that, although the usage characteristics of business customers differ from those of residential customers, these residential data are indicative of

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[11] Although AT&T uses the term average throughout its description material, it becomes evident from various annotations and appendices associated with AT&T's tabular data that averages depicting data derived from customer surveys are in all cases medians rather than numerical means.

[12] According to the results of AT&T's market survey, 26.4 percent of PRO America purchasers now subscribe to one or more OCC services and among these customers, the weighted monthly average of OCC and AT&T usage is $281 and $121, respectively. The survey further shows that 88.8 percent of PRO America purchasers would be drawn from the $0-$250 monthly bill size range and would also have average monthly AT&T bills of $75. The weighted average monthly AT&T bill across all usage bands, according to the survey, is $171. AT&T Response at Exhibit 2 and 4.

[13] For example, AT&T states that the data show that customers with up to 120 minutes per month of pre-purchase usage account for 78.1 percent of the total number of plans purchased and the plan purchasers increased their usage by 41.8 percent after purchase.

the general trend of stimulation that can be expected from PRO America business customers with relatively small bill size. AT&T Response at 14–15.

14. Finally, AT&T computes PRO America's earnings ratio to be 16.75 percent in 1985, 28.97 percent in 1986 and 44.18 percent in 1987. However, AT&T disavows these figures by arguing that any disaggregation of the message service category to calculate an earnings ratio for an individual service based on the fully distributed costs of providing the service will produce meaningless results. AT&T supports this position by citing the Commission's Order prescribing costing procedures for AT&T which found that each individual service within the broad reporting categories need not earn at a uniform level and that no methodology "is available . . . which can allocate costs in an auditable and manageable manner to more disaggregated categories."[14] AT&T Response at 64–67.

## *IV. SUMMARY OF REPLIES*

15. Commenters essentially reiterate the contentions made during initial review of the PRO America proposal, continuing to focus their attack, for the most part, on AT&T's demand estimates. In fact, commenters contend that AT&T's response raises more questions than it answers. For example, they note that AT&T's assumption that churn will increase in 1987 due to competition is inconsistent with its assumption of no competitive response. TDX argues that to the extent the churn factor for PRO America is derived from AT&T's experience with Advanced 800 Service it is understated since a significantly lower churn rate can be expected for services lacking close substitutes.

16. Commenters further assert that until equal access is available on a more widespread basis, the OCCs must continue to price their inferior services at a significant discount. US Telecom observes that if the OCCs do respond by reducing their rates by a matching amount, there is no reason to assume any of their customers will migrate to PRO America. To the extent the OCCs either do not respond or respond with smaller rate decreases, US Telecom continues, some migration can reasonably be expected since the cost of obtaining a higher quality service would be reduced. It notes, however, that AT&T has made no attempt to

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[14] American Telephone and Telegraph Co. — Manual and Procedures for the Allocation of Costs, CC Docket No. 79-245, 84 FCC 2d 384, 398 (1981) (ICAM Order), recon., 86 FCC 2d 667 (1981), *aff'd*, MCI Telecommunications Corp. v. F.C.C., 675 F. 2d 408 (D.C. Cir. 1982).

analyze the percentage of customers that would be willing to purchase inferior quality OCC services at prices approximately 20 percent below AT&T rates, but would be unwilling to purchase those same inferior quality OCC services at prices only about 5 percent below AT&T rates. Hence, US Telecom concludes that it is difficult to determine the net revenue impact which AT&T claims in connection with traffic gained from the OCCs. Finally, GTE Sprint argues that AT&T's assertion that PRO America will remain profitable at a −1.05 elasticity (which assumes there will be competitive response) is creditable only if AT&T's other assumptions regarding costs and revenues are accepted.[15] TDX adds that when this −1.05 elasticity estimate is coupled with AT&T's acknowledgement that the cross-elastic effects of WATS yield an elasticity of −1.09, one can roughly estimate a true elasticity well below −1.0.

17. The Joint Parties note that AT&T's assumption of the same 27 percent demand stimulation (the level of stimulation associated with a −1.5 elasticity) for all PRO America customers is unreasonable because most users will not receive a full 15 percent discount on their calling due to payment of the $25 monthly charge. Given that the point elasticity method used by AT&T fails to recognize that demand response will vary with usage level, the Joint Parties conclude that it would have been more reasonable to compute arc elasticities for the differently situated users.

18. Commenters also challenge AT&T's continued use of a −1.5 elasticity in 1986 and 1987. The Joint Parties assert that by compounding its demand elasticity, AT&T unreasonably assumes that PRO America users will increase their calling by 27 percent each year, leading to a 104 percent demand increase by 1987 for customers joining in 1985. They note that once a new subscriber increases his usage, he may continue that level of usage in subsequent years, but he will not increase his usage by the same amount in those years since his rates will have remained the same. GTE Sprint contends that the impact of a price change is likely to be greater immediately following the introduction of a new pricing scheme and can then be expected to taper off. This conclusion would seem to be supported, according to commenters, by the fact that AT&T shows declining bill sizes over the three-year period. Such a trend, however, would imply that

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[15] These other assumptions relate to average customer monthly bill size, the amount of revenue resulting from diverted WATS traffic, and the extent of NTS cost savings due to PRO America stimulation. *See* GTE Sprint Reply at 49–50.

elasticity is also declining over that period. Commenters note that AT&T has failed to reconcile this inconsistency.[16]

19. While commenters do not question the assumption that average bill size will fall they do take issue with the level of decline. For example, MCI states that in order to lower overall average bill size to $206 in 1987, assuming that the 207,500 customers in 1986 (which have an average bill size of $240), maintain their level of usage in 1987, the average post-purchase monthly bill for new PRO America customers in 1987 is only $126 — far below the break even bill size of $167.[17]

20. Commenters find equal fault with AT&T's justification of pre-purchase bill sizes. US Telecom notes that in assuming that PRO America purchasers will shift some of their OCC usage to PRO America (*see* para. 12, *supra*), AT&T fails to take into account the repression that should occur as a result of the overall price increase these customers would face by migrating to PRO America. Indeed, given AT&T's assertion that PRO America rates would still exceed those of the OCCs, commenters question the reasonableness of assuming any such shift of usage to PRO America. Moreover, commenters note that even if PRO America customers do combine MTS and OCC usage to produce PRO America bills in excess of $167, this would account for only about 25 percent of the customers in the lowest band (as stated in n. 12 *supra*, this stratum represents 88.8 percent of all PRO America customers). The remaining 75 percent of customers in that stratum do not presently use OCC service and thus, commenters conclude, their $121 average bill size remains unjustified. MCI notes that the significance of understating average bill size, and hence overstating PRO America revenues derived from the $25 monthly charge, is evident from AT&T's assumption that 78 to 87 percent of total PRO America stimulated revenue between 1985 and 1987 will come from this recurring charge.[18]

21. GTE Sprint states that another factor which appears to be contributing to an inflated estimate of PRO America revenues is AT&T's understatement of the revenue lost from WATS. AT&T does this, according to GTE Sprint, by using an unreasonably low

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[16] GTE Sprint points to AT&T's Reply to Petitions to Reject or Suspend (p. 20) wherein AT&T acknowledges that smaller volume customers tend to have lower elasticities.

[17] MCI derives these figures from AT&T's Response at 17. MCI calculated the $126 average bill size by dividing the difference between 1986 and 1987 total revenue by the differences in total number of customers.

[18] MCI states that these numbers are derived from AT&T's Response at 37 and AT&T's Reply to Petitions to Reject or Suspend at 15.

estimate of WATS revenue per minute. GTE Sprint claims that a higher than average WATS revenue per minute should actually be assumed since AT&T estimates that 94 percent of the minutes diverted from WATS will come from the six highest of 14 mileage bands.[19] Hence, AT&T appears to assume, GTE Sprint asserts, that longer distance, and thus more expensive, WATS usage will be switched to PRO America under the cross-elastic effect. In addition, GTE Sprint notes that it is not clear whether AT&T's cross-elasticity estimate reflects the fact that traffic diverted from OCCs will include at least a portion that is delivered by OCCs over WATS. US Telecom states that AT&T's analysis of PRO America's impact on WATS is further flawed since it fails to distinguish between high and low volume WATS users. The latter group of customers, US Telecom asserts, is the only one which might potentially migrate to PRO America.

22. AT&T further attempts to boost PRO America's profitability, commenters argue, by understating access costs. They allege that AT&T's access charge estimates are unreasonably low as a result of overstating pure stimulation attributable to PRO America. GTE Sprint contends that AT&T's access charge estimates are unsupported since AT&T does not provide its assumption as to the number of access minutes which correlate to these rates. MCI suggests that stimulation effects on access charges are further exaggerated by AT&T's incorrect assumption that the National Exchange Carrier Association (NECA) will automatically recognize each minute of additional PRO America traffic and reduce rates accordingly.

23. Commenters contend that AT&T also treats the impact of end user subscriber line charges inconsistently. While AT&T reduces PRO America's access costs to reflect the increase in the residential and single line business charge from $1 to $2 in 1986, they note that AT&T fails to make a corresponding reduction in MTS and PRO America revenues.

24. GTE Sprint observes that the financial views provided by AT&T reflecting earnings under different assumed elasticities (AT&T Response at 56-63) indicate that per minute carrier's carrier charges vary under each elasticity scenario. Another peculiar result, according to GTE Sprint, is that lower unit costs appear to be associated with the lowest assumed elasticity of 1.0. GTE Sprint notes that a low elasticity means fewer stimulated minute which, in turn, means that NTS costs per minute should

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[19] GTE Sprint cites AT&T's Response at 30 as the source of this information.

be higher when a lower elasticity factor is used. GTE Sprint asserts that AT&T provides no explanation for these anomalies. GTE Sprint Reply at 35-36.

25. With respect to billing costs, MCI states that AT&T's assumed 83 percent reduction from about 3 cents per stimulated PRO America minute in 1985 and 1986 to 0.5 cents per minute in 1987 remains unexplained except for AT&T's statement that it will perform its own billing by 1987. MCI contends that in the absence of cost support this vague explanation does not suffice given the start-up costs AT&T will incur to implement a billing system and that fact that industry experience shows a substantial increase in uncollectables when an interexchange carrier performs its own billing. MCI Reply at 32-33. MCI adds that AT&T's other non-access costs are similarly unsupported. For example, MCI compares AT&T's assumed average marketing cost of 2.1 cents per minute for PRO America to AT&T's forecast of 3.8 cents per minute for its proposed Software Defined Network Service (SDN). MCI reasons that, if any difference is justified, PRO America should have higher marketing costs than SDN since the latter service is a high volume offering in which a single customer will generate the same number of minutes as hundreds of PRO America customers.

26. MCI notes that AT&T's Response attempts to show that PRO America remains profitable when only one of the errors and biases noted in earlier pleadings is corrected at a time. When all such errors and biases are corrected simultaneously, MCI calculates that PRO America will lose over $62 million through 1987 under AT&T's methodology. MCI adds that even when only the two most obvious errors (understated bill size and omission of end user charge impact on rates) are corrected, and other biased assumptions are allowed to remain unchanged, PRO America loses over $22 million through 1987 MCI Reply at 24-27. Finally, MCI contends that a proper fully distributed cost (FDC) analysis must correct these errors and biases and further that AT&T's FDC analysis ignores the loss in earnings to the remaining MTS category. MCI observes that under AT&T's assumptions, the MTS category will lose over 3 billion minutes of traffic by 1987 (AT&T Response at 17) and asserts that a corresponding reduction in earnings for the non-PRO America MTS category should properly have been reflected in a FDC analysis.

27. Commenters claim that AT&T's recent financial results indicate that it can easily sustain losses from PRO America. They note that in April AT&T reported an overall rate of return of

16.59 percent for the month and a 14.56 percent return year-to-date.[20] AT&T can also subsidize PRO America losses, commenters argue, by increasing rates to its other customers.

28. MCI asserts that such cross-subsidization would establish discrimination between large and small MTS users. This discrimination, MCI continues, would be unlawful under Section 202(a) of the Communications Act, 47 U.S.C. § 202(a), since it cannot be justified on the basis of either cost or competitive necessity.

29. Commenters allege that this discriminatory market segmentation also poses a threat to the development of effective competition inasmuch as PRO America is targeted to the user segment in which OCCs have achieved their greatest market penetration. This user segment, GTE Sprint argues, is the part of the market most available to the OCCs. It notes that the larger users generally are unattainable because the OCCs are unable to provide the services these users demand, such as uniform nationwide premium access and 800 Service. Smaller customers, GTE Sprint continues, are difficult and expensive to attract to an OCC service due to high marketing costs, the failure of a discount to provide much of an incentive to switch to an OCC and the high percentage of such customers who have rotary phones.

30. In light of the importance of this market segment to the OCCs, commenters submit that by forcing the OCCs to reduce further their rates,[21] and thus their profit margins, PRO America limits the OCCs' ability to expand their networks and absorb sharply increasing access costs.[22]

31. Finally, Ad Hoc urges approval of the proposed tariff, subject to several conditions to protect other ratepayers and competitors in the event that AT&T's forecasts prove to be incorrect and PRO America results in a revenue shortfall. These conditions are as follows: (1) AT&T should be required to submit monthly reports showing the actual demand, revenue and cost

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[20] Commenters cite AT&T, Interstate Monthly Report No. 1, April 1985, filed June 12, 1985.

[21] GTE Sprint states that because of the piecemeal implementation of Feature Group D access and the customer confusion resulting from the lack of universal premium access, the OCCs must continue to offer their services, including equal access services, at a substantial discount from AT&T's rates.

[22] Lexitel asserts that in order to offset rising access costs it is critical that OCCs be able to reduce transmission costs by accumulating reasonable traffic densities over intercity networks. It states that to achieve improved densities OCCs must be able to attract customers with reasonable traffic volumes and that PRO America unreasonably impedes their ability to do so. Lexitel urges that given the piecemeal approach to the equal access transition and the advantages AT&T has solely because of its historic monopoly position, PRO America should be found unlawful on equity considerations.

characteristics of the service; (2) AT&T shareholders should be required to bear the ultimate risk of any net revenue losses attributable to the service over a reasonable life-cycle; and (3) AT&T should not be allowed to discontinue the service or increase the rates for the service during the first 36 months after the service has been implemented, absent Commission approval based on a clear and convincing justification.

## *V. DISCUSSION*

### *A. Summary of Findings*

32. The Commission, as a general matter, has encouraged new service offerings which involve rate reductions because such offerings further our goal of promoting rate relief for the nation's telecommunications users. Measured against this standard, the proposed PRO America tariff has appeal because of its 15 percent discount for MTS use. We would fail in carrying out our public interest responsibilities, however, if we permitted the attractiveness of the proposed discount to color our analysis of whether AT&T's proposed offering should be allowed to take effect. As we will discuss, we must keep in view the fact that AT&T bears the burden of demonstrating that PRO America will be able to cover its costs and, therefore, will not result in giving undue preference to a select customer group.

33. The Commission is concerned with the question of whether the proposed tariff is compensatory for two principal reasons. First, if PRO America fails to recover its costs, then the continued offering of the service would involve a cross-subsidy flowing to PRO America from other MTS ratepayers. The burden of such a cross-subsidy could result in higher rates for these other MTS customers or could deprive them of rate reductions which AT&T would have been able to implement in the absence of the cross-subsidy. Second, the pricing of PRO America below cost is likely to have an adverse effect on the continued development of competition in the long distance marketplace. A central focus of the Commission's policy initiatives in recent years has been the promotion of long distance competition, since we have concluded that such competition is the best means of providing efficient and innovative services to telecommunications users at reasonable prices. We have an obligation under the statute to review particular tariff proposals made by dominant carriers with the purpose of guarding against predatory pricing and practices which may have a detrimental impact on competition.

34. We apply strict scrutiny to this tariff review process because of AT&T's standing as the dominant carrier in the interstate long distance market. Precisely because of this dominance, we believe that AT&T has the power and the opportunity to cross-subsidize services and adversely affect competition through its tariff offerings.

35. Our review of the PRO America tariff has led to two general conclusions: AT&T has not adequately supported its view of revenues generated by the offering, and AT&T has not adequately supported its estimate of associated costs. We have reached these conclusions after a detailed analysis of the record. We note that AT&T has built its defense of the proposed tariff on a number of critical assumptions regarding the service's profitability. Our review of these assumptions, in the absence of adequate cost support, has left us with serious doubts as to their reasonableness.

36. Five basic assumptions are at the center of AT&T's claim that the proposed tariff is compensatory. First, AT&T assumes that competitors will not respond with similar discounted offerings. AT&T uses this assertion to buttress its prediction of demand elasticity. Since, as we discuss, *infra*, we do not find adequate justification for this assumption, we believe that it leads to an overestimate of demand response and an inflated projection of revenues. Second, AT&T calculates, based on an econometric model developed for MTS, that the segment of the MTS market most likely to purchase PRO America will experience substantial demand stimulation based on an estimated $-1.5$ elasticity coefficient. AT&T applies this high stimulation throughout the three-year forecast period. While such stimulation may not appear unreasonable when applied to customers whose pre-purchase bill size clearly makes PRO America attractive, AT&T fails to demonstrate that it is reasonable to continue to apply such a high stimulation in later periods when, as we shall discuss later in this section, average bill size appears to drop precipitously.

37. Third, the assumptions AT&T makes regarding the average bill size of customers who are likely to subscribe to PRO America appear to result in overly optimistic projections. This would have the effect of inflating AT&T's revenue projections because lower average bill sizes have the effect of both increasing revenues from the $25 recurring charge, and minimizing the reduction in MTS revenues. Fourth, as we will demonstrate subsequently, AT&T may have underestimated PRO America's access costs, the effect of which would be to inflate further the service's projected

profitability. Fifth, in assessing the impact of subscriber line charges on PRO America, AT&T assumes that the carrier common line charge (and, thus, PRO America's costs) will decline at the time the subscriber line charge is increased to $2 in 1986. AT&T also assumes however, that PRO America rates (and, thus, revenues) will not be reduced by any flow through of the carrier common line reduction.

38. The following discussion in this section will demonstrate that AT&T has not made a convincing showing in support of the five core assumptions underlying its revenue and cost projections. Since these assumptions go to the heart of the issue of wether PRO America is compensatory, AT&T's failure to support these assumptions leads directly to our conclusion that AT&T has not met is burden of demonstrating that PRO America will recover its costs. AT&T's response to our investigation issues is, at bottom, an attempt to demonstrate that if AT&T has erred with respect to one of its central assumptions, such an error is not fatal to AT&T's basic assertion that PRO America is compensatory. Without reaching the validity of this argument, we stress here that we have concluded that AT&T has failed to prove the reasonableness of its principal assumptions. This leads us to the conclusion that the proposed tariff is unlawful and must be withdrawn.

### *B. Period for Measuring Profitability*

39. As we have noted, our analysis of the evidence in this record leads us to find that AT&T has failed to show that the PRO America offering would be compensatory in 1986 or 1987. We do not need to reach the question of whether three years is an appropriate time frame in which to measure profitability in order to determine the lawfulness of this particular optional calling plan. AT&T has chosen such a time frame for purposes of presenting its case and has not presented any evidence with respect to profitability of the service in any other time frame.

40. In addition, where questions of lawfulness in matters involving preferential rates for certain customer groups are involved, the carrier seeking Commission approval of proposed tariff revisions has the burden of proof.[23] If the carrier fails to

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[23] *See* American Trucking Association, Inc. v. F.C.C., 377 F. 2d 121 (D.C. Cir. 1966), *cert. denied*, 386 U.S. 943 (1967). *See also* Tariffs-Evidence, 40 FCC 2d 149, 151–52 (1973) and cases cited therein. We note that the *ICAM Order* which was cited by AT&T for the proposition that individual services need not earn at a uniform level also states that AT&T must, nevertheless, bear the

provide "reliable, probative and substantial evidence"[24] demonstrating that its filing is just, reasonable and not unreasonably discriminatory[25] it is incumbent upon us to find the tariff unlawful. The standard by which the justness and reasonableness of rates are measured is whether they are based on the costs of providing the service.[26] AT&T claims that PRO America is justified under a fully distributed cost standard. Inasmuch as PRO America represents an MTS pricing option available to a limited sector of the market, AT&T has the burden of demonstrating that the proposed rates are compensatory and will not result in giving undue preference to a select customer group. Stated another way, AT&T has the burden of showing that PRO America will not unlawfully discriminate against smaller MTS users who are less susceptible to competitive diversion. AT&T has not met this burden as the record does not support its claim of profitability for PRO America over a three-year period. The shortcomings and inconsistencies found in AT&T's cost support data have not been sufficiently corrected by its subsequent pleadings or its responses to our investigation questions. Moreover, the reasonableness of the key assumptions underlying the filing can be seriously questioned, as we have indicated in our earlier discussion.

### *C. Projected PRO America Revenues*

#### *1. Demand Elasticity*

41. The projected level of PRO America's profitability is largely dependent upon AT&T's assertion that there will be no competitive response to the PRO America offering.[27] We conclude that AT&T has not provided a reasonable basis for this assertion. While the OCCs may not respond by reducing their rates by a

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burden of demonstrating the lawfulness of individual tariff filings. 84 FCC 2d at 399.

[24] 40 FCC 2d at 152.

[25] Sections 201(b) and 202(a) of the Communications Act, 47 U.S.C. §§ 201(b), 202(a).

[26] The Commission has stated that "carriers themselves generally stress that their revenues must exceed their costs, and our established regulatory policies are to regard costs either as directly controlling in the fixing of rates or as benchmarks from which to measure any departures from costs with a clear and persuasive showing required for such departures." 40 FCC 2d at 154.

[27] According to AT&T, elasticity drops to -1.05 when competitive response is assumed. *See* para. 8 *supra.* Although PRO America could still be profitable at this level, most of AT&T's other assumptions would have to be accepted for it to remain so.

matching amount, it appears unreasonable to assume there will be no response at all. Indeed, it seems unconvincing for AT&T to claim, on the one hand, that PRO America will divert millions of dollars of OCC traffic to AT&T and, on the other hand, to assume that its competitors will take no action in an attempt to keep their customers. This assumption also is inconsistent with AT&T's own claims that PRO America is being introduced in response "to the highly competitive interexchange telecommunications marketplace" (D&J at 2) and that PRO America would even benefit OCC customers "since it can be expected that AT&T's competitors will respond by introducing their own new rate plans" (D&J at 4). Moreover, AT&T fails to harmonize this assumption with its assumption that churn will increase in 1987 due to competition. AT&T's justification for this assumption — that PRO America rates would still exceed OCC rates — does not take into consideration or attempt to refute the claims of its competitors that, until equal access is more widely available, they cannot compete with AT&T unless the price differential between their services remains at or above a particular level.

### 2. *Demand Stimulation*

42. AT&T's use of a −1.5 elasticity coefficient for each of the first three years results in stimulating usage of all PRO America purchasers by 28 percent. Although the Joint Parties contention that this stimulation factor is compounded over the three-year period appears incorrect, we are inclined to question the reasonableness of continuing to apply this high stimulation factor in subsequent years as average bill size declines far below initial levels. As we shall discuss in more detail following, the best we are able to deduce from AT&T's data is that average bill sizes of very significant numbers of customers purchasing PRO America after its initiation are well below the economic cross-over point of $167. These customers and the associated bill sizes derived directly from a market survey conducted for AT&T. Even were we to assume that customers of bill sizes below $121, for example, would in fact purchase PRO America, we can find nothing in the record to validate an assumption that such customers could sustain the high level of stimulated growth attributed to them.

### 3. *Average Bill Size*

43. If average bill sizes of customers forecasted to purchase PRO America are understated, as it appears from the record, the profitability of the service would be overestimated because of two

important factors. First, as average bill size increases, so does revenue dilution. That is, more revenue is shifted from full-rate MTS service to the PRO America discount schedule. Second, the lower the average bill size, the more revenue is derived from the $25 recurring charge. AT&T has not provided convincing arguments that would support its conclusion that large numbers of customers with bill sizes well below the economic cross-over point of $167 would in fact purchase PRO America. As it appears from the data before us, the average post-purchase bill size which AT&T has shown for each year in the study period indicates that the average monthly bill for new PRO America customers in 1987 is only $126. *See* para. 19, *supra.*[28] Serious questions are raised by this low bill size regarding whether customers purchasing PRO America at this level would in fact be acting irrationally inasmuch as they would incur financial penalties as a result of such purchases.

44. We are also concerned about the low $121 median pre-purchase dial station bill size of all projected PRO America purchasers who use a competitor and we are unpersuaded by AT&T's proferred justification. *See* para. 12, *supra*. We recognize that the effect of a low pre-purchase bill size may be mitigated by customers switching business from other services, notably OCC services, to PRO America. AT&T forecasts that about 26 percent of the customers will in fact shift business away from OCCs. This still leaves substantial doubt about the validity of accepting the $121 median. First, the lower the MTS dial station bill size the less likely customers will be to shift business from other services.[29] Secondly, there would still remain 74 percent of the projected customer base not shifting traffic away from OCCs. Since 50 percent of all customers are seen as having a pre-purchase bill size below $121, there would remain a large number of PRO America purchasers with unrealistically low average bill size. This is not to say that we do not recognize that a portion of OCC customers would be likely to shift demand to AT&T even

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[28] Though we recognize that churn, *i.e.*, customers terminating service being replaced by new customers with no net change, may cause some of the change in average bill size, it does not appear that AT&T has made any plausible explanation to refute MCI's assertion that the average bill size for new customers entering the market between 1986 and 1987 would be substantially below the average of all PRO America customers, and very probably below the economic cross-over point of $167. There appears to be no other way in which we can explain the drop of approximately $34 in average bill size between 1986 and 1987.

[29] *See* AT&T Response at Exhibit 4. AT&T states that only 26.4 percent of PRO America purchasers also use a competitor.

though, as AT&T states, PRO America rates are higher. This is partly because once a customer is at or near the economic crossover point for PRO America, the customer could increase the dollar value of its total AT&T and OCC savings by shifting all traffic to AT&T. Additionally, we recognize that some customers may attach value to obtaining premium service at a price lower than MTS rates and to having a single supplier for its toll service needs. We cannot conceive, however, that customers at a billing level well below the economic crossover point would find it attractive to shift OCC traffic to AT&T since at low billing levels the 15 percent discount would not be sufficient, in aggregate, to make up for the loss of savings the customer obtains from the OCC.[30]

### *D. Projected PRO America Costs*

#### *1. Access Costs*

45. AT&T appears to assume lower access costs than we would consider reasonable, thereby inflating PRO America's profitability. *See* para. 11, *supra.* These costs appear to be understated largely because AT&T has overestimated the stimulation effects attributable to PRO America. AT&T provides its estimates of carrier common line charges, showing a decline in each of the three years. It also tells us that 36.2 percent of total PRO America stimulation represents pure stimulation, or traffic new to the telecommunications industry. We are unable to verify, however, whether the number of stimulated minutes of use (MOU) corresponding to this percentage in a given year is consistent with the MOU that would be needed to drive per unit NTS costs down by the amount which AT&T estimates. AT&T provides its

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[30] In a pure numerical sense, it becomes less attractive to shift business to PRO America as AT&T bill size decreases. If, for example, a customer has an AT&T MTS bill of $100 per month and an OCC bill of $100, and assuming the OCC rates are 15% below AT&T's rates, the customer would be realizing an effective savings of approximtely $18 per month; *i.e.*, the customer would pay $18 more per month if it used AT&T's present service exlusively. If the customer now shifts all of its OCC business to AT&T, for a combined pre-discount bill of $218 per month, its net savings from PRO America would amount to only $7.70, more than $10 less than it was saving previously. If we were to stimulate the $100 AT&T usage by 28% in accordance with AT&T's projected elasticity coefficient of –1.48, the savings would still amount to only $11.90 per month. If, on the other hand, a customer has an average AT&T monthly bill of $165, very close to the PRO America economic cross-over point, and an OCC bill of $100, assuming a 15% OCC discount, the customer would realize a savings of $17.45 without the 28% stimulation of AT&T revenue and $24.35 with stimulation compared to the $18 monthly savings which the customer previously realized.

assumptions regarding access revenue requirements (AT&T Response at 40–42), but does not tell us the amount of revenue requirement which should be attributed to each of its 10 assumptions. In addition, it has not provided its assumption as to the number of total industry access minutes corresponding to its access rate estimates.[31] Without these revenue and demand figures we are unable to verify AT&T's assumptions regarding stimulation effects and therefore cannot determine whether in fact AT&T has aggregated new traffic and traffic captured from competitors in calculating NTS cost.[32]

46. Even assuming *arguendo* that such aggregation has not occurred, access costs would still be understated to the extent that AT&T has overstated pure stimulation alone. AT&T states that total industry weighted MOU will be stimulated by a factor of 0.2 percent in 1986.[33] This factor, however, is inconsistent with AT&T's estimate that pure PRO America stimulation for that year will be 115.5 million MOU.[34] Taking 169 billion MOU as a baseline and assuming 5 percent growth, it appears reasonable to assume that total industry MOU in 1986 will be on the order of 177 billion.[35] Based on AT&T's claim that PRO America will stimulate total industry MOU by 0.2 percent in 1986, pure PRO America stimulated MOU would be 354 million MOU. Converting 115.5 million conversation MOU to access MOU using a factor of 2.24[36] yields stimulated access MOU of 258.7 million, which is 37 percent lower than the result using a stimulation factor of 0.2

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[31] The only indication in AT&T's Response as to the total industry MOU it has assumed is at page 43 wherein it states that it used the Common Carrier Bureau's *Memorandum Opinion and Order*, Transmittal No. 23, Mimeo No. 1990, released Jan. 17, 1985, to derive its 1985 access rate estimate. That Order forecasted total carrier common line demand in 1985 to be about 169 billion access minutes.

[32] This concern was raised in the *Investigation Order* at paras. 12 and 23. Minutes captured from competitors are not new stimulated minutes, but existing industry minutes and therefore would not drive per unit NTS costs down any further.

[33] AT&T Response at 44. According to AT&T, this factor takes into account the offsetting effects of WATS and OCC service.

[34] Gross PRO America stimulated MOU of 319 million (AT&T Response at 32) multiplied by 36.2 percent.

[35] This assumption is a conservative estimate intended for illustrative purposes only.

[36] AT&T offers only a general description of how it converted conversation minutes to access minutes without providing the numerical factor employed. AT&T Response at 42. GTE Sprint derived a conversion factor of 2.24 for 1986 from AT&T's own estimates. It divided carrier's carrier charges for that year by the access rate to derive access minutes, and then divided this result by AT&T's assumption of total PRO America minutes. GTE Sprint Reply at 32. We conclude that this assumed conversion factor is reasonable.

percent. The appropriate stimulation factor corresponding to 258.7 million MOU is only 0.146 percent. Hence, AT&T appears to have either overstated its estimate of pure stimulation or assumed an unreasonable number of total industry access minutes. This latter conclusion seems to be confirmed by GTE Sprint's calculation that, based on a 0.2 percent stimulation factor, industry access MOU would be only 129.4 billion (258.7 million MOU divided by 0.2 percent) in 1986. Moreover, even if AT&T's estimates of pure stimulation were accurate, it has failed to take into account that there will be a lag in NECA's recognition of these additional MOU and thus in its reduction of access rates.

### 2. *Subscriber Line Charges*

47. Similarly, AT&T appears to have treated the effects of a declining end user subscriber line charge on costs and revenue inconsistently. On the one hand, AT&T seems to estimate that increasing the residential and single line business charge from $1 to $2 in 1986 will cause the carrier common line charge to decline in 1986. On the other hand, AT&T does not make correlative reductions in PRO America revenues, even though it would have been more reasonable, in light of the February 26, 1985 Order,[37] to assume that the Commission would require AT&T to flow through its lower carrier common line charge in the form of lowered rates.

## *VI. CONCLUSION*

48. AT&T has not demonstrated that PRO America would cover its costs over the time period chosen by AT&T. We conclude, therefore, that AT&T has not shown that the proposed rates are just and reasonable pursuant to Section 201(b) of the Act, 47 U.S.C. § 201(b). To the extent that PRO America is noncompensatory, rate reductions that might otherwise have been triggered by lower per minute access costs attributable to demand stimulation may not be realized. AT&T would have to forego the implementation of any such rate reductions to other MTS ratepayers in order to recover the revenue shortfall caused by PRO America. Hence, not only would other MTS ratepayers realize no benefits from the introduction of PRO America, they could be forced to bear the burden of its losses. This potential

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[37] CC Docket Nos. 78-72 and 80-286, Memorandum Opinion and Order, FCC 85-71, at para. 41. While we are not committing ourselves to any specific course of action in this regard, we note that, at a minimum, AT&T should have presented its revenue estimates both ways.

cross-subsidization of PRO America by other MTS ratepayers would constitute unreasonable discrimination in violation of Section 202(a) of the Act, 47 U.S.C. § 202(a).

49. We must also be cognizant of the fact that in the present environment, a below-cost tariff will harm not only other ratepayers, but the development of effective competition as well (which in the long run will further disserve ratepayers). *See* paras. 29–30, 33–34, *supra; see also*, *e.g.*, GTE Sprint Reply at iv. As a general matter, forcing competitors to compete is an objective which we encourage.[38] Two part tariffs are a legitimate tool for achieving this objective, but they must be adequately supported and compensatory before they can be used as the driving force for such competition.

## *VII. ORDERING CLAUSES*

50. Accordingly, IT IS ORDERED that pursuant to sections 201(b) and 202(a) of the Communications Act, 47 U.S.C. § 201(b), 202(a), the PRO America offering of AT&T Communications investigated in CC Docket No. 84–128 and the Block-of-Time Call America offering of Alascom, Inc. ARE UNLAWFUL.

51. IT IS FURTHER ORDERED that the tariff revisions filed by AT&T Communications under transmittal No. 301 and by Alascom, Inc. under Transmittal No. 313 SHALL BE WITHDRAWN.

52. IT IS FURTHER ORDERED that the investigation in CC Docket No. 85–128 IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*
September 18, 1985

## *CONCURRING STATEMENT OF COMMISSIONER JAMES H. QUELLO*

In re: AT&T PRO America Optional Calling Plan

In rejecting this tariff modification, the Commission has again delayed an important benefit to the public in the form of significant rate relief. While I believe the record cost support can be deemed sufficient to find the tariff lawful, I have reluctantly come to the Bureau's view that rejection is the more appropriate course given our continued treatment of AT&T as the "dominant" carrier.

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[38] The Commission noted in the *Order* that "in many cases, rate reductions carried out by carriers will result in beneficial effects both for the carriers, through the stimulation of new traffic, and for their customers. We often have sought to encourage rate reductions in order to realize these benefits." *Investigation Order* at para. 22.

I question the wisdom of continuing to apply dominant carrier status to AT&T in all of the markets in which it wishes to participate. There are markets — the low density interstate markets, for example — where AT&T clearly remains dominant albeit not necessarily always by choice. There are other markets, including the one targeted by PRO America, which is highly competitive and in which AT&T is clearly handicapped by relatively high tariff rates. There is no valid public policy being served by requiring that those rates remain significantly higher than necessary.

Small to medium size businesses and their customers stood to benefit from the proposed tariff modifications and some of those benefits will be lost because of our rejection of the tariff. However, I have been encouraged to believe that there will be sufficient information in the rejection order to enable another filing, with all of the requisite support, in the near future.

The tariff review process provides the Commission with wide latitude in making determinations about lawfulness. I am convinced that there is no effort to abuse that discretion and I believe that the Bureau will encourage further modifications of these tariffs to make them more competitive. Therefore, I concur.

**Common Carrier, Tariffs, Software Defined Networks, Virtual Private Line Services, Unreasonable Discrimination, Bypass Tariff, Investigation**

**Commission Order adopted terminating investigation of AT&T and Northwestern Bell tariffs for software defined network services and permitting tariffs to take effect.**
**—*AT&T Communications***
**CC Docket No. 85-203**

**FCC 85-583**

## BEFORE THE
## FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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|---|---|
| In the Matter of | CC Docket<br>No. 85-203 |
| AT&T COMMUNICATIONS<br>Revisions to Tariff F.C.C.<br>Nos. 1, 9, and 10 | Transmittal<br>No. 321 |
| NORTHWESTERN BELL<br>TELEPHONE CO.<br>Revisions to Tariff F.C.C. No. 52 | Transmittal<br>No. 991 |

### MEMORANDUM OPINION AND ORDER

Adopted: October 31, 1985; Released: November 7, 1985

BY THE COMMISSION:

1. On May 31, 1985, the Common Carrier Bureau suspended the tariff revisions captioned above pending an investigation of certain issues raised by the filings.[1] By its revisions, AT&T Communications (AT&T-C) is seeking to establish what is known in industry parlance as a "virtual private line service." AT&T-C has named its offering "Software Defined Network" (SDN) service. Northwestern Bell Telephone Company's (NWB) tariff

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[1] AT&T Communications, CC Docket No. 85-203, Memorandum Opinion and Order, Mimeo No. 5282, released June 20, 1985.

revisions would establish local, switched access for software defined networks which it has named "Software Network Capability" (SNC). In this Order, we are completing our investigation with respect to certain issues and identifying additional information regarding certain remaining issues which we will require from the parties as it becomes available. We will permit the proposed revisions to take effect on November 4, 1985 subject to further investigation. In the following paragraphs, we discuss the rationale for our disposition of the various issues.

## *I. BACKGROUND*

### *A. Procedural History*

2. AT&T-C filed tariff revisions on March 6, 1985 to its Tariff F.C.C. Nos. 1, 9, and 10 to establish SDN service with an effective date of June 4, 1985. Petitions to reject or suspend and investigate were filed by numerous parties. NWB filed revisions to its Tariff F.C.C. No. 52 establishing, *inter alia*, switched local exchange access arrangements for SDN-type services. A petition to reject and a petition to suspend and investigate were filed against NWB's offering.

3. On May 31, 1985, the Chief, Common Carrier Bureau, adopted an Order (*Investigation Order*) which suspended the proposed revisions and initiated an investigation of certain issues raised by the services as proposed. In accordance with the Order, AT&T-C and NWB filed direct cases responding to the specified issues and interested parties filed comments and replies thereto.[2] AT&T-C and NWB also filed rebuttals.[3]

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[2] Replies were filed by Ad Hoc Telecommunications Users Committee (Ad Hoc), the Bell Atlantic Telephone Companies (Bell Atlantic), MCI Telecommunications Corporation (MCI), New York Telephone Company and New England Telephone (NYNEX), Satellite Business Systems (SBS), and US Telecom, Inc. (UST). Comments were filed by the Central Committee on Telecommunications of the American Petroleum Institute (API), BellSouth Corporation (BellSouth), Pacific Bell and the Southern New England Telephone Company (SNET). Letters supporting AT&T-C's offering of SDN were filed by Aetna Life and Casualty and Xerox Corporation. Several parties (GTE Corporation, the National Telephone Cooperative Association, the Organization for the Protection and Advancement of Small Telephone Companies, Teltec Saving Communications Company and the Western Union Telegraph Company) filed notices of intent to participate as parties but did not file further pleadings.

[3] The rebuttals were filed pursuant to Public Notice, "Procedures for Filing Rebuttals in CC docket No. 85-203, Investigation of AT&T Communications' and Northwestern Bell's Proposed SDN Tariffs," Report No. 5900, released July 19, 1985.

### *B. Description of Proposed Services, Rates, and Rate Structure*

4. AT&T-C's SDN service provides private line service using the shared facilities of AT&T-C's MTS switched network and enables customers to create, in effect, a private line network. Under the SDN tariff, customers identify the specific points they wish to connect via SDN service. AT&T-C stores these customer selections in its computer and switching software and assigns each customer's network a seven-digit numbering plan. When a customer wishes to call a station on its network, the customer dials the seven-digit number assigned to that station. If a customer wishes to call a point off its network, the customer dials a single digit for off-network access plus the regular ten-digit number for that location in the North American numbering plan. Thus, the standard features of SDN service are station-to-station calling, a separate numbering plan for points on the customer's network, and the availability of off-network calling. Customers may also select, from an AT&T-C menu of optional features and functions, routing and call handling instructions which they would like applied to their traffic.[4] SDN traffic is transmitted between AT&T-C's central offices over its shared, switched network to the locations, and in accordance with the routing and call handling instructions, selected by the user.

5. Customers may obtain local access to AT&T-C's facilities in three ways. Their locations may be connected directly to AT&T-C's central switches via special access lines obtained from the local exchange carrier (LEC). They may also use a new type of switched access developed for SDN services which AT&T-C refers to in its filing as "standard switched access."[5] Finally, customers could provide their own facilities between their locations and AT&T-C's facilities. AT&T-C expects customers to connect high-volume locations with special access lines or their own facilities and low-volume locations with standard switched access. Calls to points off the software defined network are terminated over regular switched access lines.

6. AT&T-C's proposed rate structure for SDN contains a combination of usage-based rates, flat-rated recurring charges, and non-recurring charges. The usage-sensitive rates appear in three rate schedules (Schedules A, B, and C) whose application depends upon the kind of local access chosen by the SDN customer. If a

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[4] The selections available to customers are listed in the *Investigation Order* at n.6.

[5] NWB's proposed revisions would establish local switched access of the kind referred to by AT&T-C as "standard switched access."

customer uses switched access on both the originating and terminating ends of a call, the rates in Schedule A apply. Schedule A customers may use "standard switched access" on the originating end and either "standard switched access," for "on-net" calls, or regular public switched access, for "off-net" calls, on the terminating end. Customers cannot use regular public switched access to originate a call.[6] If a customer uses special access on one end and "standard switched access" on the other (or uses, on the terminating end only, regular switched access), the rates in Schedule B apply. If a customer uses special access on both ends of a call, the rates in Schedule C apply.[7] The prices in each schedule vary according to distance and time of day.

7. In addition to the usage-sensitive charges proposed in Schedules A, B, and C, AT&T's tariff proposes usage-sensitive charges for some of the optional features. As originally proposed, the tariff included a five cent per call charge for the "private network interface" option which permitted private networks to be interconnected to SDN service. By Special Permission No. 85-833, AT&T-C was permitted to amend its proposed revisions to eliminate this charge effective November 4, 1985. Accordingly, we do not address in this order the discussion in the pleadings regarding the proposed charge.

8. AT&T-C also proposed certain recurring and non-recurring charges, including a monthly recurring charge of $50 per "access line grouping, various monthly recurring charges for optional features, a non-recurring "network implementation charge" of $105,000 (for network design and engineering), a non-recurring "installation charge" of $200 per "standard switched access" line, a non-recurring "access line grouping implementation charge" of from $600 to $1,000 per 50-line grouping, and various non-recurring installation and service order charges for each optional feature.

9. NWB states that its SNC offering provides "dedicated CAMA ANI trunks"[8] for large business customers using the public switched network. NWB would route calls from the customer premises to the interexchange carrier through a rate

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[6] As the *Investigation Order* pointed out, "standard switched access" lines are dedicated solely to SDN since it is the use of the SDN-dedicated lines that enables the LEC and AT&T-C switches to "recognize" an SDN call. Thus, an SDN call cannot be originated over a regular switched line.

[7] These schedules do not include the individual LEC's charges for special access.

[8] NWB Description and Justification at 3. "CAMA" refers to centralized automatic message accounting and "ANI" refers to automatic number identification, both of which are provided at the local exchange level.

center in an NWB end office. The interexchange carrier would do all call screening. The service would be available only under Feature Groups C and D. Thus, until feature Group D becomes available in end offices converted for equal access, SNC would be a local access option available only to AT&T-C.

10. For its service, NWB proposes monthly rates that range by state from $69 to $74 "per originating service," and from $73 to $78 "per two-way service." No monthly charge is imposed "per terminating service." NWB also proposes non-recurring charges ranging from $928 to $1,015 "per originating service," from $741 to $497 "per terminating service," and from $1,004 to 1,059 "per two-way service."

## *II. DISCUSSION*

### A. *Rate Discrimination and Unbundling Issues*

#### 1. *Unbundling Issues*

11. The *Investigation Order* noted that SDN service (with either standard features or optional features) could be characterized as an offering of basic transport over the shared, switched MTS network in combination with customized, computerized, network management features. If SDN represents the bundling of transmission and computerized network management services, our review of the tariff must consider whether these components should be unbundled and offered separately to users. Accordingly, the *Investigation Order* requested comments and additional information in order to determine whether the service was a bundled offering and, if so, whether the service should be offered on an unbundled basis. Parties were asked to address whether unbundling was technically and economically feasible and whether an unbundled offering would be useful to customers.

12. We have decided not to require unbundling of AT&T-C's SDN offering at this time. While it is true that the basic service (without optional features) provides both transmission facilities and network management features, the combination is not an artificial linking of separable components. Standard SDN service simply harnesses the ability of AT&T-C's public switched network to route traffic to pre-selected points. We have concluded that the offering is an integrated service which results from the network control capabilities intrinsic to the switching software embedded in AT&T-C's No. 4 ESS switches and from the interaction

between the switch and AT&T-C's CCIS network.

13. In addition, the record indicates that unbundling the various functions available under the SDN tariff is not technically or economically feasible at the present time. Separation of the transport functions to enable customers to use other carriers' transmission services would require massive re-design and re-deployment of AT&T-C's present switching software and signaling network architecture. The *Investigation Order* had questioned whether AT&T-C-generated call routing and handling instructions, if offered separately, could be applied efficiently to traffic transmitted over non-AT&T-C facilities. MCI argues in its reply to AT&T-C's direct case that "there is no reason why dedicated circuits cannot be provided by another carrier as they are provided today in EPSCS arrangements."[9] As AT&T-C observes, however, use of other carriers' facilities would require integration of those facilities into AT&T-C's operating support systems and data bases as well as provision of CCIS signaling. The costs involved in such an undertaking would be prohibitive, especially in light of the fact that other carriers are already providing virtual private line network services independently.

14. Finally, the record indicates that an unbundled offering would not be useful to users. Both Ad Hoc and API, who represent large users, state in their comments that their needs are best met by an integrated offering. Moreover, as AT&T-C observes, to the extent that there is a demand for a particular call handling feature on a stand-alone basis, such features are available in a variety of customer premises equipment (such as "smart" PBXs) and in Centrex or other switching services. If demand for an unbundled offering should arise in the future, we can re-visit the issue.

### 2. *Rate Discrimination Issues*

15. The *Investigation Order* stated that, even if SDN represented an appropriate bundling of service components, the proposed rate structure must nevertheless be based on a consistent treatment of "like" service components. To the extent that SDN service constitutes switched network service similar to MTS or WATS services, the different rates for SDN service could be unjustly or unreasonably discriminatory and therefore in violation of Section 202(a) of the Communications Act, 47 U.S.C. § 202(a). Accordingly, the *Investigation Order* asked parties to address

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[9] MCI Reply at 23.

whether SDN service is "like" MTS or WATS and whether any differences between the services justify differences in their rates.

16. We have concluded that further investigation is required to make a determination under Section 202(a). Even if we assume, *arguendo*, that SDN and WATS or MTS are "like" services within the meaning of Section 202(a), the SDN tariff would not necessarily require rejection because the statute prohibits only rate discrimination that is unjust or unreasonable. Our investigation indicates that there are differences in the cost of providing SDN service which may justify differences in the rates for SDN, MTS, and WATS services.[10] For example, customers taking service under Schedule C of the SDN tariff use special access lines to connect with the AT&T-C switch. Special access service can represent a considerable cost savings over the switched access lines used to connect users to MTS service. SDN service also does not include features such as operator assistance, "Calling Card" calls, and detailed billing which contribute to the higher costs for other services. Moreover, AT&T-C's pricing of similar service components for purposes of deriving the SDN rate structure, including basic transport over the shared, switched network, appears to be consistent with the pricing underlying the rates for MTS and WATS.[11] AT&T-C also claims that SDN rates are set at the levels necessary to recover the fully distributed costs of the service and to make a positive contribution to revenues. Finally, the existence of lower-priced competitive alternatives in both the virtual private line[12] and MTS/WATS markets is relevant to any determination as to whether the proposed offering is unreasonably or unjustly discriminatory in the present circumstances.

17. We do not have sufficient information at this point in our investigation, however, to determine whether AT&T-C's proposed rates are unjustly or unreasonably discriminatory. The additional information regarding costs, operational efficiencies, revenues, and demand that is required to make a final determination of the reasonableness of the proposed rates will become available only

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[10] We note in this context that the rates for SDN service may not be lower than those for MTS and WATS. For example, the rates for SDN service under all three rate schedules are equal to or higher than those for WATS for all calls except those made to the first two mileage bands by a user whose volume is approximately 15 hours per month.

[11] *See, e.g.*, Letter to John Cimko, Jr., Chief, Tariff Division, from William R. Moore, Division Manager, Federal Regulation Department, AT&T (May 15, 1985).

[12] Similar virtual private line services have been announced, or are currently being provided, by US Telecom's ISACOMM subsidiary, MCI, GTE Sprint, Allnet, SBS and Western Union.

after actual operating experience with the service. By continuing our investigation beyond the expiration of the statutory five-month suspension period on November 4, 1985, we will be able to obtain the operating data we require.[13] Accordingly, though the tariff will become effective by operation of statute, we are not terminating our investigation of the rate discrimination issues identified in the *Investigation Order*. Upon completion of our investigation, we will order any necessary adjustments should we find that the rates are unreasonably or unjustly discriminatory.[14]

### *B. Bypass Issues*

18. The *Investigation Order* requests parties to address issues regarding the potential uneconomic bypass of local exchange facilities that could result from AT&T-C's implementation of SDN service. The *Order* noted that, to the extent that SDN attracts MTS/WATS users and, through its rate structure, makes SDN service using special access components more attractive than switched services, the rate structure creates an incentive for users to shift their traffic from services that use switched access, like MTS/WATS or Schedule A SDN, to services that use special access.[15] The *Order* also noted that the LECs' overall recovery of their non-traffic sensitive costs would decrease if customers were to shift significant amounts of traffic from MTS/WATS to SDN service under Schedules B and C. If customers shift to SDN service solely to avoid the contribution to non-traffic sensitive (NTS) costs reflected in local switched access rates, then the resulting bypass of the local switched network could be "uneconomic" because it would be prompted by regulatory pricing distortions rather than relative actual costs or service advantages.

19. In its Direct Case, AT&T-C demonstrates that any bypass of switched services resulting from customer migration to SDN will most likely be insignificant. Citing demand projections and analyses of the cross-elasticities between SDN and MTS, WATS, AT&T-C's private line services, and various OCC services, AT&T-

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[13] The Common Carrier Bureau is directed to prepare information requests regarding the actual performance — both technical and financial — of the service once it has been in operation for a sufficient time to generate the data required. In no event shall this period exceed one year from the date this Order is adopted. To protect users in the event that we find the rates to be unreasonable, we order AT&T-C to keep accounts of the amounts it receives for SDN service.

[14] The existence of this investigation does not relieve AT&T-C of its continuing obligation to revise its rates on its own initiative if it finds that the rates have produced a return that is excessive.

[15] *Investigation Order* at para. 22.

C states that it expects 70 percent of the demand for SDN to come from interexchange services that use special access (such as AT&T-C's and the OCCs' private line services, OCC virtual private line networks, WATS-like services, etc.). Of the 30 percent attributable to migration from switched services, two-thirds would be offset by the demand for switched access to SDN. By 1987, AT&T projects a reduction in switched access demand, attributable to migration to SDN, of about 175.4 million access minutes nationwide compared to total switched access demand of 195 billion access minutes for the period from June 1985 through May 1986 (as estimated by the National Exchange Carrier Association in its July 2, 1985 annual access filing). Expressed as a percentage, the projected suppression in demand for switched access minutes attributable to the introduction of SDN service is less than one tenth of one percent.

20. In their replies, several parties dispute the reliability of AT&T-C's demand estimates. In addition, Bell Atlantic argues that AT&T-C's demand projections reflect the dampening effect on demand which results from the proposed $105,000 non-recurring charge. Because AT&T-C can alter this charge at will, Bell Atlantic argues that potential demand was understated. BellSouth states summarily that its "studies" (which it neither identifies nor describes) show that its revenues will drop by $38 million annually due to migration to special access for SDN. NYNEX argues that AT&T-C's demand forecasts are not sufficiently refined. NYNEX argues that metropolitan areas will experience a greater proportion of demand suppression because it is from those areas that most SDN users will come.

21. In rebuttal, AT&T-C observes that rejection of its tariff will not eliminate the threat of bypass because the virtual private line network offerings of AT&T-C's competitors present the same threat. AT&T-C reiterates that the bulk of SDN traffic will have migrated from services that did not use any switched access. In response to Bell Atlantic's claim regarding the effect of the $105,000 non-recurring charge, AT&T-C emphasizes that it has no plans to eliminate the charge. AT&T-C attacks BellSouth's calculation of a $38 million loss as unsubstantiated. Because SDN customers will be primarily private line users, AT&T-C argues that demand for SDN will track the distribution of private line services which will prevent the disparate impact of migration cited by NYNEX.

22. We have concluded that the bypass threat posed by the introduction of SDN service is not a sufficient basis for finding the proposed tariff revisions unlawful. The Commission has never determined that the Communications Act requires rejection of a tariff solely because of the bypass that may result from introduction of the service. On the contrary, while we are acutely aware of the injurious impact that significant uneconomic bypass can have upon local exchange carriers and users of the public switched network,[16] we emphasize that the solution to the problem of uneconomic bypass lies in the proper allocation of NTS costs among switched and private line services, not in the disallowance of new services. Proper cost allocation produces relative prices for switched and special access services free of the regulatory distortions that can create uneconomic market incentives like those underlying uneconomic service bypass. Rather than attack the bypass problem at its source, opponents of SDN would have us respond on an ad hoc basis by evaluating the bypass impact of individual tariff filings. Such an approach would result in the creation of a Byzantine system of regulatory restraints and tariff review principles that can only perpetuate the problem by addressing its effects rather than its cause.

23. Moreover, even if we were to make the ad hoc determination advocated by the parties, we would nevertheless conclude that the SDN tariff should be permitted to take effect. The uncontroverted evidence in the record before us indicates that no significant level of uneconomic bypass would result from introduction of SDN service. SDN customers will migrate by and large from private line services that use special access service.[17] Indeed, the introduction of SDN service may very well have some salutary effects on local exchange service since it will likely appeal to the very users of LEC services who are most able to turn to facility bypass alternatives. If these users choose SDN (or a competing virtual private line service), they will be using

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[16] Our ongoing concern over the effects of uneconomic bypass is well established. See, e.g., Bypass of the Public Switched Network, CC Docket No. 78-72, FCC No. 84-635 (released Jan. 18, 1985).

[17] AT&T-C's cross-elasticity studies indicated that some SDN demand will be drawn from WATS. In light of the Joint Board's recent decision to recommend the direct assignment of WATS access lines to the interstate jurisdiction (see MTS and WATS Market Structure, Recommended Decision and Order, CC Docket Nos. 78-72 and 80-286, FCC No. 139, released Oct. 8, 1985), as well as the fact that WATS rates are generally lower, and thus more attractive to customers, than SDN rates, we cannot conclude that the reduction in WATS demand attributable to SND migration, if any, would produce a significant drop in switched access revenues.

LEC-provided access services (including standard switched access which provides a contribution to NTS costs) rather than going off-network entirely.[18]

24. Finally, several parties challenge the reliability of AT&T-C's demand projections claiming that the bypass that will result from the introduction of SDN service will be far greater than that projected by AT&T-C. No party refutes AT&T-C's methodology or the inferences drawn from the data. We have concluded that AT&T-C's demand projections provide a reasonable basis for assessing the bypass implications of SDN service. Reliance on projected data is inevitable where a new service is proposed. The reliability and accuracy of AT&T-C's demand projections will only be verifiable when we have actual operating results.

25. We will, however, monitor the actual shifts in demand and the extent of any bypass resulting from the introduction of SDN service. In order to do so, we will require, pursuant to the authority granted us under Section 218 of the Act, 47 U.S.C. § 218, periodic reports from AT&T-C estimating the cumulative number of access minutes which its customers shift from WATS, MTS, EPSCS, and CCSA services to SDN service. We will also require those LECs with customers for SDN-related special and switched access lines to report periodically the number of special access lines customers order to obtain SDN service, the number of switched lines for which customers seek to substitute special access lines in order to take SDN service, and the number of switched lines that customers order to access SDN service. AT&T-C will be required to provide the LECs with such information regarding the special access lines it orders which may be necessary for the LECs to make their report.

### *C. Miscellaneous Issues*

#### *1. Absence of Standard Switched Access Tariffs*

26. NWB is the only LEC to file a tariff with the Commission providing for local switched access to software defined networks. Several parties had challenged AT&T-C's filing on the grounds that, in the absence of tariffs from other LECs, AT&T-C's SDN

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[18] It is clear that SDN's impact upon switched minutes of use does not necessarily translate directly into a revenue impact on the LECs because the revenue impact of the shift to special access services will vary according to the LECs' pricing of special access. The LECs appear to have already responded to the threat of special access migration in their July 2, 1985 annual access filing. See Annual 1985 Access Tariff Filings, Mimeo No. 7401, para. 62 (released Sept. 30, 1985) (petitions for reconsideration pending).

rates are unsupported or at least premature because they purport to be based on the charges that the LECs will impose for "standard switched access." The *Investigation Order* required parties to address this issue.

27. AT&T-C's proposed rates for SDN reflect its estimate of the rates the LECs will charge for standard switched access based on estimates provided to it by certain LECs. In its direct case, AT&T-C states that it will adjust its rates if the LECs' tariff filings vary significantly from the estimates they provided. We have concluded that AT&T-C's reliance on LEC-provided estimates is reasonable for purposes of the present filing. We will require AT&T-C to adjust its rates should the LECs' tariffed rates for switched access to SDN differ significantly from their estimates.

### *2. Limitation of SNC to Feature Groups C and D*

28. NWB's tariff restricts the availability of SNC to users of Feature Group C (FGC) and Feature Group D (FGD) access. Because FGC is available only to AT&T-C, the effect of the restriction is to prevent OCCs from using SNC to interconnect their virtual private line offerings until FGD becomes available in end offices that have been converted to equal access. MCI and SBS argue that, by effectively limiting the availability of SNC to AT&T-C, NWB's tariff provides AT&T-C with an unwarranted competitive advantage.

29. NWB responds that Automatic Number Identification (ANI) is an essential part of SNC service which makes SNC impossible to offer to carriers using Feature Group A (FGA).[19] Use of SNC with FGB is also problematic because FGB service involves direct transmission of calls to the carrier's premises rather than through NWB's SNC rate center which is required for SNC service. NWB states that it is willing to explore the technical feasibility of offering SNC with FGB in response to requests for SNC service.

30. To resolve this issue, we must balance the benefits of immediate implementation of NWB's service against the benefits of-delay. Potential users of virtual private line service will benefit from immediate SNC service availability. NWB, and other carriers who may offer the service subject to similar technical limitations, will benefit from the increased contributions to NTS cost recovery that result from provision of some switched access to SDN,

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[19] FGA is a line side service incapable of forwarding ANI.

however limited in availability. The only effect of delaying implementation, as the OCCs would have us do, would be temporary. Once all end offices are converted to equal access, the service would be available to both AT&T-C and the OCCs on an equal basis.

31. We have concluded that NWB should be permited to offer the service as proposed. Once NWB converts its end offices to equal access, the OCCs will be on an equal footing with AT&T-C with respect to their offering of switched access to their virtual private line offerings. Until that time, NWB's tariff does not prevent the OCCs from continuing to offer their virtual private line services using presently available local access configurations. Moreover, nothing in the court decree requiring equal access prevents local carriers from providing access to AT&T-C that cannot be provided to other interexchange carriers pending conversion.[20] Finally, we note that local carriers have a financial incentive to work with the OCCs and attempt to overcome technical obstacles to the provision of switched access for SDN-type services.[21]

### 3. *Economic Justification Required by Section 61.38*

32. The *Investigation Order* also asked parties to address whether AT&T-C and NWB had provided adequate cost support under § 61.38 of the Commission's Rules, 47 C.F.R. § 61.38. Section 61.38 requires a filing carrier to provide, *inter alia*, an explanation of its filing, the basis of ratemaking employed, working papers, and statistical data. The section also requires the carrier to submit a study projecting the costs of a new service offering over a representative twelve month period and an estimate of the effect of the new matter on the traffic and revenues for the service to which the new matter applies, on the carrier's other service classifications, and on the carrier's overall traffic and revenues. We have concluded that the information provided by AT&T-C in support of the SDN tariff, as supplemented by the information provided as part of its direct case, reasonably meets these requirements and provides an adequate basis for our conclusion that the filed rates should be permitted to take effect pending completion of our investigation.

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[20] *See* United States v. AT&T, No. 82-0192, slip op. at 3 (D.D.C. May 7, 1985).

[21] We require NWB to make a good faith effort to accomodate the OCCs and overcome the technical obstacles to offering SNC with FGB. If it fails to do so, we will take whatever corrective action may be necessary.

## *III. CONCLUSION AND ORDERING CLAUSE*

33. By this order, we are disposing of certain issues raised by AT&T-C's SDN tariff filing and NWB's SNC tariff filing. We are continuing our investigation of the rate discrimination issues previously identified in our *Investigation Order* and further explained in paragraphs 15–17, *supra*. We have concluded that both services can be permitted to take effect as scheduled on November 4, 1985 pending completion of our investigation.

34. IT IS THEREFORE ORDERED, pursuant to Section 201(b) of the Communications Act, 47 U.S.C. § 201(b), that the American Telephone and Telegraph Company keep accurate accounts of amounts received under the tariff revisions discussed herein.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Application, Amendment of, Right to File
Application, Not Acceptable for Filing
Mobile Radio Service, Cellular
Notice, Sufficiency of
Reconsideration, Petition For, Treated as Appropriate for Review
Rules, Failure to Conform

**Order on Reconsideration adopted regarding the return of Round IV cellular applications which had been returned for impermissible CGSA extensions or unexplained 39 dBu contour extensions into central MSAs referred to Commission in order to reach final decision on acceptability for filing with a minimum of delay. Pre-lottery amendments to correct defects not allowed. Reconsideration denied concerning six applications which were properly returned for failure to satisfy properly noticed Commission requirements. Reconsideration granted for one application because the CGSA extension indicated on the map submitted with the original of the application was demonstrated to be a mistake.**
***—Bell Atlantic Mobile System***

FCC 86-42

## BEFORE THE
## FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re

Petitions for Reconsideration of the
Return of Round IV Cellular Applications
for the Extension of Contours and Service
Areas into adjacent MSAs.

### ORDER ON RECONSIDERATION

Adopted January 17, 1986; Released January 24, 1986

BY THE COMMISSION:

1. Various Round IV cellular applicants seek reconsideration of the actions of the Chief, Mobile Services Division, returning their applications as unacceptable for filing. The petitions have been

referred to the Commission under Section 1.106(a)(1) of the Rules in order to expedite a final decision on the matters raised. The reasons for return of the applications listed in the Attachment hereto include the failure to provide an engineering explanation for various extensions of proposed 39 dBu contours into adjacent central MSA's and proposing CGSA's which extend into adjacent central MSA's in violation of Section 22.903(a) of the Commission's rules. Accordingly, the listed applications have been consolidated for reconsideration.

## *Discussion*

### *A. Commission Requirements Regarding Extensions of CGSAs and 39 dBu Service Contours into Central MSAs*

2. The Commission's policies regarding cellular geographic service areas (CGSA) and reliable service contours (39 dBu contours) were established with the intent of providing flexibilty for cellular licensees to modify their systems as changes in demand require. *Cellular Communications Systems,* 86 FCC 2d 469, 509–510 (1981) (*Report and Order*). The key factor, we noted, was the definition of the CGSA at the outset so that such modifications could occur without oversight. *Id.* We initially allowed the applicant to define its CGSA as the area it intended to serve, subject to the requirement that the 39 dBu contours proposed in the initial application must cover at least 75% of the CGSA. *Id.* A proposal to change the boundaries of the CGSA in any way would be considered a "major application." *Id.* On the other hand, we stated that we would consider a proposed change in facilities that did not result in the extension of the 39 dBu contours beyond the CGSA as a "minor application" not subject to public notice or petitions to deny. *Id.*

3. In *Cellular Communications Systems,* 89 FCC 2d 58 (1982) (*Reconsideration Order*), we made several changes to the rules to facilitate the processing of cellular applications. One was to limit the discretion of applicants in defining their own CGSA's by requiring the CGSA to be referenced to Metropolitan Statistical Areas (MSA). *Reconsideration Order, supra,* at 86–87. We believed that this new requirement would preclude significant overlap between adjacent service areas which would limit arguments over the scope of proposed CGSA's and facilitate the disposition of competing applications. *Id.* However, we did permit extensions of CGSA's beyond the MSA boundary where the extensions were *de*

*minimis* and did not include area within another "central" MSA. *Id.*

4. In response to questions regarding cellular filings, the Bureau issued *Public Notice*, "Cellular Application Filing Procedures", Mimeo 2973, March 24, 1982 (*Filing Procedures*). Guidelines were there established for applicants proposing service to natural markets just beyond an MSA border in regard to determining whether a particular extension of the service area is *de minimis*. Such extensions would likely be permitted when: (1) they were designed to avoid interference conflicts, since that was the Commission's primary basis for limiting definition of the CGSA by the applicants; and (2) they demonstrated a strong public interest consideration (e.g., need for service not otherwise available). *Filing Procedures, supra*, at 2. Another important consideration would be the relationship of the size of the extension to both the total size of the CGSA and the MSA where the extension occurred. *Id.* The Bureau adhered to the prohibition against proposed service areas which extended into a central MSA or were more than *de minimis. Id.*

5. Further guidelines were established in *Public Notice*, "Cellular Application Filing Procedures, An Update", 52 RR 2d 725 (1982) (*Procedures Update*). The Section 22.903(a) requirements regarding CGSA extensions were reiterated, and the Bureau stated that applications for Rounds II and III would be defective if they proposed CGSA extensions into central MSA's. *Procedures Update, supra*, at 2. The Bureau also stated that the 39 dBu contours should be contained entirely within the MSA. *Id.* However, minor overlap of the 39 dBu contours would not render an application defective if there were a specific explanation in the application "of why it was necessary to engineer the particular cell(s) such that the 39 dBu contours could not be kept entirely within the SMSA." *Id.* The Bureau further noted that after consideration of the explanation, the staff might require an amendment to pull back the extension of the contour(s). *Id.*

6. In *Cellular Radio Service*, 56 RR 2d 1583, 1587 (1984) we specifically recognized that the *Procedures Update*: "... stated that applications for markets below the top 30 would not be rendered defective, however, by minor overlap of *39 dBu contours* (but not the CGSA) into another NECMA or central MSA, provided an engineering showing was included demonstrating why such extension was necessary" and affirmed "the Bureau regarding overlap of 39 dBu contours into another central MSA or NECMA." Finally, in *Cellular Lottery Rulemaking*, 98 FCC 2d

175 (1984) (*Lottery Order*), we amended Section 22.903(a) to add the additional requirement that applicants must define their CGSA's to include at least 75 percent of the area or the population of the involved MSA. However, the *Lottery Order* in no way changed the Commission's requirements regarding CGSA and 39 dBu contour extensions.

### *B. Applications Returned for Impermissible CGSA Extensions*

7. Cellular Advanced Radiophone Systems, Inc. d/b/a CARS (CARS) filed a Petition for Reconsideration of the return of its application for the Columbia, South Carolina MSA. CARS submits that the extension of its proposed CGSA is due to a map drawing error which occurred in the process of redrawing the map several times during preparation of its application. CARS states that the boundary of the CGSA, which was depicted as coextensive with the 39 dBu contours of Cell Numbers 6 and 9 rather than with the Columbia MSA boundary, was misdrawn. CARS asserts that the map depiction of the CGSA is inconsistent with other parts of its application which explain how it defined its CGSA, and contends that the Division overlooked these written sections of the application and must have relied only on the map in its finding.

8. CARS contends that the text of its application, not the map, represents the accurate definition of its CGSA because the multiple statements in application Exhibits 1.1H and 3[1] are consistent with each other, and the map represents the only inconsistency. CARS further contends that the accuracy of the text is substantiated by its statement that its proposed 39 dBu contours cover 95.8% of the CGSA area. If the CGSA contours were as depicted by the map it filed, CARS argues that the 39 dBu contour to CGSA area ratio would be larger, approximately 96.8%. CARS next asserts that since the production of the map is

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[1] Exhibit 1.1H states: "that applicant's proposed 39 dBu contours combine to provide coverage to 95.8% of the total CGSA"; that "CGSA extensions beyond the SMSA boundary are *de minimis* and do not include any area within another central SMSA"; that "the Applicant's proposed CGSA is depicted as a dashed line on the attached map"; and that "for clarity, where the CGSA tracks either the MSA or a 39 dBu contour, it has been drawn immediately adjacent to that boundary. This is for illustrative purposes only and the proposed CGSA is intended to be coextensive with those boundaries". Exhibit 3 states that the applicant has provided a composite map depicting the Columbia MSA, applicant's CGSA and 39 dBu contours in compliance with Sections 22.903 (a) and (c), and 22.913(a)(2). It also states that with a planimeter, it was determined that the combined 39 dBu contours proposed will cover approximately 95.8% of the CGSA.

dependent on technical data which is found only in the text of the application, it is the text which should be considered the primary source of system design since the map is only a graphic depiction of the data used. CARS urges that if the map error is viewed in the context of the other application exhibits concerning the CGSA, it can be considered only as an inadvertent mechanical drafting mistake. In addition, CARS asserts that none of its other Round IV applications have problems with extensions into central MSA's and that its application for the adjacent Augusta MSA proposes a CGSA which does not extend beyond the Augusta-Columbia MSA border. Finally, CARS contends that since applicants in other rounds have been permitted to correct their maps, and the question of extensions was not finally resolved until the Commission's decision in *Cellular Radio Service, supra*, it should be permitted to replace the map in its application with the corrected map attached to its Petition.

9. We find CARS' arguments to be unpersuasive. CARS' main contention is that the error in its map is merely clerical, and hence, should be ignored because the correct definition of its CGSA is contained in the text of its application. This argument must be rejected. First, the submission of a map depicting the applicant's proposed CGSA is a basic cellular filing requirement of both Sections 22.913(a)(2) and 22.903(a) of the Commission's rules. While the depiction of the 39 dBu contours are necessarily based upon engineering data contained elsewhere in the application, the CGSA contours are defined in the applicant's discretion and are not, solely a graphic depiction of engineering data. In addition, it is the map depiction of the CGSA which defines the extent of a cellular licensee's protected service area. *See* Section 22.903(b) of the Commission's rules. *See also GTE Mobilnet of Cleveland, Inc.*, 54 RR 2d 1410, at 1415 fn. 5, where a new map was required to be filed because of conflicting descriptions of a CGSA in the application text and the map filed with the application. Thus, an accurate map depiction of the CGSA is a crucial element in the cellular licensing scheme and not the mere depiction of other data as argued by CARS. Second, the text of CARS' application is internally inconsistent. CARS' petition refers to its application statement that the CGSA tracks either the MSA boundary or the relevant 39 dBu contour as support for confusion in the drawing of its CGSA line. However, while this statement is consistent with CARS' depicted CGSA, it is inconsistent with the statement that the CGSA does not include any area within another central MSA. The statement that the proposed

CGSA is intended to be coextensive with both the MSA and 39 dBu contour boundaries does not clarify the matter. Finally, CARS' argument concerning the 39 dBu contour coverage percentages can not be credited. CARS' application merely states that its 39 dBu contours cover 95.8% of its CGSA without providing any underlying data for this calculation. The calculations concerning 96.8% coverage appear only in its Petition for Reconsideration.

10. Moreover, CARS' reference to other applications in other markets is of no moment. The fact that other CARS' applications complied with the Commission's requirements does not demonstrate that the CGSA extension involved here was a clerical error. CARS' submission of a revised map is precluded by the Commission's Round IV cellular filing guidelines and is a prohibited amendment. Section 22.918(b) of the Commission's rules; *Digital Transmission Corporation*, Mimeo 6705, released August 30, 1985. Our acceptance of revisions to maps as minor amendments in previous cellular filing rounds was limited to those rounds, and is not applicable here because of the Section 22.918(b) prohibition of pre-lottery amendments. Finally, we have, since the *Reconsideration Order, supra*, consistently prohibited CGSA extensions into central MSA's. Thus, we reject CARS' contention that such prohibition was not finally resolved until the decision in *Cellular Radio Service, supra*. Based upon the above, we conclude that the Petition filed by CARS has no merit, and it will be denied.

11. Continental Telephone Company of New York, Inc. (Continental) filed a Petition for Reconsideration of the return of its application for the Utica-Rome, New York MSA which included a map depicting its CGSA as extending into the adjacent Albany-Schenectady-Troy, New York central MSA. Continental concedes that the map of its CGSA filed with the original copy of its application did appear to show such an extension. However, it asserts that the apparent extension was due to a mistake in producing that copy of the map. In producing the defective copy, the engineer for Continental states that transparent sheets depicting the proposed CGSA became misaligned with the copy of the USGS map as they were fed into the copying machine. According to Continental's affidavit, this slippage alone caused the depicted extension. Further, Continental contends that the slippage occurred only on this one copy of its map; that the duplicate copy routed to the Commission's Cellular Public Reference Room shows no CGSA extension and that these facts indicate that the extension at issue was not, in fact, proposed.

Finally, Continental submits that the text of the original application does not propose any CGSA extension, and states that an inspection of the flawed copy of the map reveals the overlay slippage since the latitude/longtitude cross-hairs for the overlay and the base map are distinctly separate, when they should appear as one.

12. After reviewing the evidence and arguments presented by Continental, we conclude that reconsideration should be granted. Unlike the CARS' application discussed above, the CGSA extension depicted in continental's original application is demonstrated to be a mistake both through reference to the defective map itself and through reference to the other copies of the map already on file at the Commission. Accordingly, without reliance on any amendment, we can now find that Continental does not propose a CGSA which impermissibly extends into an adjacent central MSA. We will grant reconsideration and reinstate the Continental application.

### C. *Applications Returned for Unexplained 39 dBu Contour Extensions*

13. Bell Atlantic Mobile Systems, Inc. (BAMS) filed a Petition regarding the return of its application for the Newport News-Hampton, Virginia MSA. BAMS contends that the land area covered by the 39 dBu contours extensions into the Richmond and Norfolk central MSA's are merely small percentages of the total contour coverage for its proposed system; that most of the area in these minor extensions could not receive uninterrupted reliable cellular service; and that the Division overlooked BAMS explanation that the proposed cell sites are all located within the Newport News MSA and are needed for provision of reliable service within it. BAMS argues that its situation comes within the Commission's objective of allowing additional design flexibility provided by minor overlaps into central MSA's. *Cellular Radio Service, supra,* at 1588. BAMS also contends that even if its explanation is deemed insufficient, the Division should have requested a corrective amendment to pull back its contours instead of returning the application as defective.

14. After reviewing the evidence and arguments presented, we conclude that BAMS' application did not provide the specific engineering explanation required. *Procedures Update*, *supra*, at 2. The area covered by the 39 dBu contour extensions for cell sites "XX, YY" and "E" does appear to be minor. However, the size of the extension is not the relevant issue regarding acceptability for

filing. The *Procedures Update, supra*, established that a minor extension of proposed 39 dBu contours beyond the CGSA would not render an application defective if the application included "a specific explanation of why it was necessary to engineer the particular cell(s) such that the 39 dBu contours could not be kept entirely within the SMSA (or NECMA)." The paragraph from its application which BAMS cites as the required explanation merely states that the reliable service area contours of the cell sites are defined in accordance with Section 22.903 and that the *cell sites* are needed for reliable service within the MSA. Such a general explanation of why the cell sites are needed can not be considered as a specific explanation for the necessity of the 39 dBu *contours* of such cell sites extending into adjacent central MSA's. We also reject BAMS argument that the extension areas could not receive uninterrupted reliable cellular service. If BAMS' 39 dBu contours were properly calculated, the area within such contours, by definition, is capable of receiving reliable cellular service. Finally, the return of BAMS' application rather than requiring an amendment to pull back the contours was correct. While the *Procedures Update, supra*, authorized the staff to require an amendment to pull back an applicant's contours, such an amendment is appropriate only where the specific explanation proffered by the applicant has been found not to justify the extension. Here, BAMS provided no specific explanation for its extensions, and the lack of such an explanation properly resulted in its application being rejected as defective. Based on the above, we conclude that BAMS' Petition lacks merit, and it will be denied.

15. Cellular Technology, Inc. (CTI) filed a Petition for Reconsideration of the return of its application for the Columbia, South Carolina MSA. CTI contends that the Division erred in not finding a specific explanation for the extensions of proposed cell numbers 4 and 5 into the adjacent Augusta central MSA. CTI contends that its application exhibit SFA-2 satisfies the requirement for a specific engineering explanation for the extensions. Exhibit SFA-2 states in part:

> The sites for the Columbia market have been carefully selected to furnish extensive coverage of the MSA. Geographic coverage has been provided that will serve the population clusters in the MSA and all the major routes into and out of the metropolitan Columbia area.

CTI also refers to its engineering certification in Exhibit SFA-2 of its application which states:

> **It is our opinion that the engineering associated with this system is in full compliance with the Rules and Regulations of the Federal Communications Commission on cellular mobile radio systems, including the November 1, 1982 Public Notice of the Commission entitled "Cellular Application Filing Procedure - An Update."**

CTI contends that the certification and other statements in Exhibit SFA-2, when read in conjunction with its map, satisfy the engineering explanation requirement. CTI also argues that the *Procedures Update*, *supra*, is specifically limited to Round II and III cellular applications, and that, if applicable to Round IV filings, it does not provide any criteria for the "specific explanation" required. Finally, CTI asserts that the alleged defect does not relate to its qualifications to construct and operate the proposed system in the public interest, and that due to various instances of the uncertainty of Round IV processing rules and changes by Commission staff in applying them, any ambiguity in the applicability of the specific engineering requirement here ought to be resolved in favor of CTI.

16. CTI's arguments do not persuade us that the return of its application was in error. Paragraph one of CTI's Exhibit SFA-2 first addresses the general reason for the selection of cell sites in the Columbia MSA. The next sentence only notes that the proposed coverage will serve the population clusters and major routes into and out of the MSA. Whether read by itself, or in conjunction with the map of the proposed system, this statement plainly does not address why the 39 dBu contours could not be kept entirely within the MSA. CTI did provide an explanation at Page 2 of Exhibit 1 to its Petition, but such explanation would constitute a prohibited amendment pursuant to *Lottery Order*, *supra*, at 220. *See* also *Digital Transmission Corporation*, *supra*. The statement of compliance by the engineering consultant in application Exhibit SFA-2 simply expresses the opinion that the system engineering has complied with the *Procedure Update*, *supra*, but does present any explanation or justification for the specific extensions. Finally, the explanation requirement clearly is applicable to all cellular applications for markets below the top 30, *Cellular Radio Service*, *supra*, at 1587, and the requirement was sufficiently clear that only the 5 applicants involved here, out of the more than 5,000 Round IV applications filed, failed to provide the required explanation. Since there was no widespread and reasonable misapprehension of the extension explanation requirement, CTI is simply not in a position comparable to the applicants affected by *Public Notice*, CL-304, released April 26,

1985. Accordingly, we conclude that CTI's Petition lacks merit, and it will be denied.

17. U. S. Cellular/Celltech Partnership (USC/CP) filed Petitions for Reconsideration regarding the return of three of its applications.[2] The first Petition concerns USC/CP's application for the Vallejo-Fairfield-Napa, California MSA. The Division found that Cell Numbers 1 and 2 had 39 dBu contours extending into the adjacent Sacramento and San Francisco central MSA's, and that USC/CP's Vallejo application did not provide a specific engineering justification for such extensions. USC/CP quotes the statement in its application that is "design goal of maximum coverage of populated areas and highways within the Vallejo MSA was achieved through careful placement of its cells and by careful selection and orientation of transmit antennas." Application Exhibit, 2.3–2, pgs. 2.3–2, 2.3–3. USC/CP also states that "Exhibit [2.3] and Exhibit 2.4 through 2.6 show how this application complies with the Commission's cellular design concepts, and includes the 39 dBu coverage map." Application Exhibit 2.3, p. 2.3–1. Next, USC/CP refers to its statement in Application Exhibit 2.6, at p. 2.6–8, that:

> . . . Sites were initially selected according to their position on an idealized expansion grid to allow optimized coverage of the CGSA. In addition, other geographic, topographic, and demographic factors such as land availability and unusual or irregular MSA boundaries influenced the positioning of base sites for this system."

USC/CP contends that these statements from its application indicate its cognizance of the irregular shape of the border of the Vallejo MSA which is surrounded mostly by adjacent MSA's. USC/CP further explains that these factors were considered to arrive at the best design to cover the major highways and/or population centers identified in accordance with its market survey. In addition, USC/CP submits information on the 39 dBu contour and CGSA coverage of the Sacramento Cellular Telephone Company and the Bay Area Telephone Company cellular systems for the Sacramento and San Francisco cellular MSA's and compares these to the 39 dBu contour and CGSA coverage of its proposed Vallejo system. USC/CP asserts that the engineering design for the CGSA and 39 dBu coverage of Round II and III applications was considered in designing its Round IV applications, including the one for the Vallejo MSA.

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[2] The three USC/CP submissions consist of engineering statements which explicitly refer to the letters returning the applications. Thus, we are treating them as Petitions for Reconsideration.

18. After reviewing the evidence and arguments presented, we conclude that the application statements to which USC/CP refers do not satisfy the specific engineering explanation requirement. The statements are general expressions of overall design goals that all applicants would attempt to meet in designing their proposed systems. The considerations for placement of the cell sites do not address the sole relevant issue of why it was necessary to engineer *particular* cells such that the 39 dBu contours could not be confined within the MSA. *Procedures Update*, *supra*, at 2. USC/CP's elaboration on its application text does not rectify its failure to provide explanations for the particular cells with contour extensions to which the Division referred in its return letter. The cited application pages, Exhibit 2.3 pgs. 2.3-2, 2.3-3 clearly show that USC/CP gave specific explanations for the contour extensions of two other proposed cells, Numbers 3 and 8, and indicate USC/CP's understanding of the *Procedures Update* explanation requirement. The additional explanations provided in USC/CP's Petition respecting Cell Numbers 1 and 2 could only be considered as a clarifying amendment. As such, they are barred by Section 22.918(b) of the Rules, which prohibits the filing of pre-lottery amendments for markets below the top 90. *Lottery Order*, *supra*, at 220; *Digital Transmission Corporation*, *supra*. Similarly, the additional explanations concerning proposed systems for adjacent MSA's cannot be accepted since the information and exhibits pertaining to them are extrinsic to USC/CP's Vallejo application. Accordingly, we find that USC/CP's Vallejo Petition lacks merit, and it will be denied.

19. USC/CP's second Petition concerns its application for the Utica-Rome, New York MSA. The Division had found the application unacceptable for filing due to the failure to provide a specific engineering explanation for the 39 dBu extensions of Cell Number 1 into the Syracuse, New York central MSA. USC/CP refers to the same three statements from the same exhibits to this application as it did in its Petition concerning its Vallejo application. Utica-Rome MSA Application Exhibit 2.3-2, pgs. 2.3-2, 2.3-3. It also refers to the part of its application which indicates that Cell Number 1 has the least population and lowest projected subscriber demand of all of its proposed cells. Application Exhibit 2.3, pgs. 2.3-8, 2.3-9. USC/CP now asserts that the boundary line between the Utica-Rome and Syracuse, NY MSA's in the area of the contour extension is non-uniform and irregular, and that using a directional antenna at Cell Number 1 or reducing the power or antenna height would have reduced the area of its 39

dBu contour coverage to less than 75% of its CGSA in violation of Section 22.903. USC/CP finally notes that its proposed cellular design for the Utica-Rome MSA considered the cellular filings for the Syracuse MSA as well as the 39 dBu contour and CGSA extensions of the proposed coverage of the Syracuse licensee into the Utica-Rome MSA. USC/CP Petition, at pgs. 1-2 and Exhibit 1, Supplements A and B.

20. USC/CP has not presented any evidence or arguments that would lead us to a conclusion different from the one we reached regarding its Vallejo application. Again, the *application* statements that it cites do not demonstrate that it provided a specific engineering explanation for the extension of Cell Number 1 in particular. USC/CP did provide such an explanation for Cell Number 3 which also has minor extensions into the Syracuse MSA. The information from its marketing study does not explain the need to engineer the cell at issue so that an extension of its contour results. The additional explanations, information and exhibits now submitted are not part of the original application and cannot be accepted because they constitute a prohibited amendment. *Lottery Order*, *supra*, at 220; *Digital Transmission Corporation*, *supra*. We reject, however, USC/CP's attempt to justify its extension by arguing that engineering Cell Number 1 without the extension would have resulted in a violation of the 39 dbu contour coverage requirement of Section 22.903. System design is entirely within USC/CP's control, and the coverage requirement could have been satisfied either through CGSA reductions or through an additional cell. Accordingly, we conclude that the USC/CP Utica-Rome Petition lacks merit, and it will be denied.

21. USC/CP's final Petition concerns its application for the Colorado Springs, Colorado MSA which was returned for failure to provide a specific engineering explanation for the extension of the 39 dBu contour of proposed Cell Number 6 into the Denver-Boulder central MSA. In its Petition, USC/CP refers to the same three statements in its application, USC/CP Application Exhibit 2.3, pgs. 2.3-1 to 2.3-3, which we have addressed previously and have found to be insufficient. USC/CP also refers to statements in its application concerning the need for two-cell overlap. USC/CP cites the overlap between Cell Numbers 2 and 6 as preventing "shadowing" of the signal in the mountainous terrain. Application Exhibit 2.3, pgs. 2.3-1 to 2.3-2. USC/CP's contention appears to be that in designing Cell Numbers 2 and 6 to provide the desirable overlap, the extension of Cell Number 6

at issue was unavoidable. Further, USC/CP maintains that the terrain data for Cell Number 6, Section 2.6–5 of its application, demonstrates the mountainous nature of the areas which it proposes to cover. In addition, USC/CP submits that for Cell Number 6 it considered the options of a directional antenna, DA-major lobe orientation, and reduction in power/antenna height; however, these were not feasible because of the mountainous terrain and the difficulty in locating this cell to provide coverage to the only highway through this area. USC/CP also submits new exhibits which include additional mountain terrain data that it contends demonstrate that there will, in fact, be no extension of Cell Number 6. Moreover, contends USC/CP, the Denver MSA area into which Cell Number 6 extends is not covered by the cellular system of the Denver cellular licensee which fact was taken into consideration in designing the USC/CP system for Colorado Springs.

22. For the same reasons presented above, we conclude that USC/CP has not provided a specific engineering explanation for the Cell Number 6 39 dBu contour extension. USC/CP's statement regarding overlap between Cell Numbers 2 and 6 to prevent "shadowing" does not resolve the obvious inconsistency that it was able to design cell 2 with no extension but was unable to design cell 6 without an extension. USC/CP has not shown how its application explains why the 39 dBu contour for Cell Number 6 in particular could not be kept within the MSA. Further, the additional explanations and data provided in its Petition constitute an amendment and can not be accepted. *Lottery Order*, *supra*, at 220; *Digital Transmission Corporation*, *supra*. Accordingly, we conclude that the USC/CP Petition lacks merit, and it will be denied.

### *Ordering Paragraphs*

23. Accordingly, IT IS ORDERED, that the Petition for Reconsideration filed by Continental Telephone, Inc. respecting Application Number 4 in the Attachment IS GRANTED, and its listed application IS REINSTATED and is accepted for filing.

24. IT IS FURTHER ORDERED, that the Petitions for Reconsideration respecting all other applications listed in the Attachment ARE DENIED.

25. A copy of this order will be mailed to the Attorney of

**Record or to the Contact Representative designated in each of the involved Petitions for Reconsideration.**

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

### *Attachment*

### APPLICATIONS ASSOCIATED WITH THIS ORDER

| | |
|---|---|
| **1. Bell Atlantic Mobile Systems** | **File No. 33286-CL-P-104-B-84** |
| **2. Cellular Advanced Radiophone Systems, Inc. d/b/a CARS** | **File No. 30595-CL-P-095-A-84** |
| **3. Cellular Technology, Inc.** | **File No. 34175-CL-P-095-A-84** |
| **4. Continental Telephone Company of New York, Inc.** | **File No. 34080-CL-P-115-B-84** |
| **5. U.S. Cellular/Celltech Partnership** | **File No. 30205-CL-P-111-A-84** |
| **6. U.S. Cellular/Celltech Partnership** | **File No. 30258-CL-P-115-A-84** |
| **7. U.S. Cellular/Celltech Partnership** | **File No. 30181-CL-P-117-A-84** |

**END**

**Common Carrier, Operating Expenses**
**Depreciation Rate**

> **Commission prescribed depreciation rates and amortizations for fourteen domestic telephone companies consisting of Citizens Utilities of California, and eight Bell, three GTE, and two Continental affiliates. The rates so prescribed are for the classes of plant shown in the Appendix to the Order and are based upon the Straight Line Equal Life Group (SLELG), and Straight Line Remaining Life (SLRL) methodologies.**
> **—*Bell of Pennsylvania***

FCC 85-656

BEFORE THE

# FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

The Prescription of Revised Percentages
of Depreciation pursuant to the
Communications Act of 1934, as amended
for:

The Bell Telephone Company of
Pennsylvania
Cincinnati Bell Telephone Company
Citizens Utilities Company of California
Continental Telephone Company of
California
Continental Telephone Company of New
York
The Diamond State Telephone Company
General Telephone Company of the
Northwest, Inc.
General Telephone Company of the
Southeast
Hawaiian Telephone Company
The Mountain States Telephone and
Telegraph Company

Nevada Bell
New Jersey Bell Telephone Company
Pacific Bell
Pacific Northwest Bell Telephone Company

## ORDER

Adopted: December 18, 1985; Released: December 31, 1985

BY THE COMMISSION:

### *I. INTRODUCTION*

1. The Communications Act of 1934, as amended, grants the Commission the authority to prescribe depreciation rates for common carriers and to revise these depreciation rates when it deems necessary. By this order we prescribe revised depreciation rates for the fourteen common carriers listed above using straight-line vintage group remaining-life, straight-line equal life group remaining-life and amortization procedures.

### *II. BACKGROUND*

#### *A. Depreciation Methods*

2. We approved the use of these procedures in our final decision in *Property Depreciation*, Docket No. 20188, 83 FCC 2d 267 (1980), *reconsideration*, 87 FCC 2d 916 (1981). The remaining-life procedure is designed to distribute the unrecovered cost of an account (including any reserve deficit or surplus) over its estimated average remaining life. The equal life group procedure was adopted to allow for depreciation at rates more representative of consumption of capital than the vintage group procedure which had been used exclusively prior to our decision in that docket. In accordance with our decision, we implemented rates using these new procedures in all depreciation prescription orders beginning in 1981. This order continues the use of these procedures along with the amortization procedure which is designed to allocate the

unrecovered cost of an asset over a specified period.

### *B. Review Procedures*

3. Since the late 1940's, the Commission has reviewed and prescribed the depreciation rates of approximately one-third of the larger F.C.C. subject telephone carriers each year.

4. This year the fourteen carriers listed in the caption submitted studies proposing new depreciation rates based upon revised life and salvage estimates. These studies were reviewed in detail by our staff, which then prepared its preliminary life, net salvage, and rate proposals. Some of the state commissions prepared similar studies and recommendations. Subsequently, discussions were held to discuss the various life, net salvage, and depreciation rate proposals.[1]

5. After discussing the matters with the carriers and respective state commissions and reevaluating its preliminary recommendations, our staff issued a Public Notice dated September 26, 1985, entitled, "Depreciation Rate Prescriptions Proposed for Domestic Telephone Companies - Notice of Opportunity for Comment." The staff transmitted to each company and state commission involved a copy of the September 26 Public Notice and a list of the parameters used to calculate its recommended depreciation rates.

## *III. DISCUSSION OF ISSUES*

6. Comments were filed by four telephone operating companies, one state regulatory commission, and one user group. A copy of each of these comments is available for inspection in the Commission's Common Carrier Bureau offices.

### *A. Life and Net Salvage Parameters*

7. For all carriers except Pacific Bell preliminary staff level agreements were reached regarding life and salvage factors for all accounts. In addition, no comments were received in response to the Public Notice objecting to the preliminary agreements. Accordingly, we adopt depreciation rates based on these life and salvage factors.

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[1] For Bell of Pennsylvania, Continental of California, Continental of New York, Diamond State, GTE of the Southeast, Hawaiian Telephone, New Jersey Bell and Pacific Bell — these factors were discussed in meetings in which representatives of the carriers, respective state commissions, and our staff attended. For the remainder of the companies they were resolved in correspondence and telephone conversations.

8. Staff level agreements were also reached for all of Pacific Bell's accounts except for the following: COE-Electronic, COE Circuit-Other, Computers & AMA, Underground Cable Exchange, and Underground Conduit. For these accounts there is no consensus among the three parties. In arriving at its recommendations for these accounts our staff used the same study techniques for Pacific Bell that it did for the other carriers under review in 1985. Not surprisingly, our staff's recommendations for Pacific Bell are consistent with the life and salvage factors that it recommended for the other carriers that were reviewed this year. This is illustrated in the following table:

| *Account* | *Factor* | *Average 1985 Agreement* | *FCC Staff Proposal for Pacific* | *CPUC Proposal* | *Pacific Proposal* |
|---|---|---|---|---|---|
| Circuit | life (years) | 13.5 | 13 | 10.5 | 9.6 |
| Electronic | life (years) | 19 | 18 | 18 | 15.4 |
| UG Cable | net salvage% | −5 | −6 | −11 | −44 |
| Conduit | net salvage % | −15 | −20 | −35 | −43 |
| Computers | life (years) | 7 | 6 | 5.5 | 4.1 |

9. In Pacific Bell's study and response to the public notice it did not provide convincing evidence to demonstrate that its life and salvage factors should be set below those of the other carriers, especially the other BOCs. We have little reason to deviate from the standard study techniques and results that our staff recommends. Accordingly, we adopt our staff proposals for these accounts.

10. One final matter, during the review of Pacific Bell's depreciation rates, our staff expressed its concern that very little data had been provided that would aid in a definitive resolution of the net salvage estimates for the Underground Conduit Account. Our staff suggested that Pacific Bell provide separate plant investment, retirement, gross salvage, and cost of removal data for manholes and conduit in order to resolve the issue. Unfortunately the Company has not provided this or other additional information in its study, subsequent filing or comments that will lead to the resolution of the issue. In order to do so, however, we invite Pacific Bell to gather and provide this information for our staff's review, and we direct our staff to review this matter and recommend a change in rate if necessary for Underground Conduit either through the annual update process or in the next complete review of Pacific Bell's rates.

### B. Customer Premise Equipment

11. The vast majority of the customer premise equipment (CPE) for the BOCs was transferred to ATTIS and is not under tariff regulation at this time. In CC Docket No. 81-893 (FCC 84-483, released October 26, 1984) the Commission ordered the non-Bell carriers to detariff their embedded CPE by December 31, 1987. In conjunction with this Docket the Commission has required the states to certify that they have adopted a plan to insure compliance with detariffing. We are prescribing rates in this Order for CPE which should be used until such time as they are superseded by further notice or action of this Commission in response to the states' approved detariffing plans.

### C. Amortization Procedures

12. In past prescription orders we have approved the use of amortization procedures in lieu of remaining-life rates to resolve certain reserve imbalance problems[2]. In this order we continue to recommend that amortization procedures be used when warranted.

13. During the 1985 review, our staff identified twenty accounts which are rapidly diminishing and which have substantial reserve imbalances. After thoroughly reviewing these accounts, our staff determined that the use of an amortization procedure to resolve their reserve imbalances is consistent with Commission policy and practice.[3] Our staff then discussed these accounts with the carriers and respective state commissions and a consensus was reached that the deficiencies or the net book costs should be amortized over the periods shown below:

| *Jurisdiction* | *Account* | *Amortization Period years* |
|---|---|---|
| Bell of Pennsylvania | COE Step-by-Step | 3 |
| Bell of Pennsylvania | COE Crossbar | 3 |
| Continental of California | COE Digital-Vidar | 5 |
| Diamond State | COE Step-by-Step | 1½ |
| Diamond State | COE Crossbar | 1 |
| GTE of the N.W.-WA | AMR | 4 |
| GTE of the S.E.-NC | Automatic Switching | 5 |

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[2] See, e.g., *Depreciation Rates*, 96 FCC 2d 257 (1983), and 99 FCC 2d 1094 (1984).

[3] See *Depreciation Rates*, 96 FCC 2d 257 (1983) at paragraphs 42-53; and 99 FCC 2d 1094 (1984) at paragraphs 17-21.

| *Jurisdiction* | *Account* | *Amortization Period Years* |
|---|---|---|
| GTE of the S.E.-TN | Switchboard | 3 |
| Mountain Bell-ID | COE Manual | 2 |
| Mountain Bell-ID | Aerial Wire | 3 |
| Mountain Bell-MT | Aerial Wire | 3 |
| Mountain Bell-NM | Manual | 2 |
| Mountain Bell-NM | Aerial Wire | 2 |
| Mountain Bell-WY | Manual | 2 |
| Nevada Bell | COE Crossbar | 3 |
| New Jersey Bell | COE Crossbar | 3⅔ |
| Pacific Bell | COE Step-by-Step | 6 |
| Pacific Bell | COE Crossbar | 6 |
| Pacific N.W. Bell-WA | COE Manual | 4 |
| Pacific N.W. Bell-WA | COE Crossbar | 7 |

14. In our 1984 review of Illinois Bell's depreciation rates, Illinois Bell stated that the competitive situation in its operating area was such that if it were not allowed to recover its reserve deficiency more rapidly than the use of remaining-life rates would allow, it would not have a reasonable opportunity to recover all of its embedded costs. The Illinois Commerce Commission agreed with Illinois Bell and further stated that the increased revenue requirements that would result from a more rapid write-off of reserve deficiencies would not place an undue burden on Illinois Bell's ratepayers. We accepted the Illinois Commission's views and prescribed amortization procedures instead of remaining-life procedures for most of Illinois Bell's accounts. This year four carriers filed for the use of essentially the same procedure for the following five jurisdictions.

| *Jurisdiction* | *Amortization Period* |
|---|---|
| Cincinnati Bell - Ohio | 8 years |
| Mountain Bell - Colorado | 5 years |
| Utah | 5 years |
| Pacific N.W. Bell - Washington | 5 years, except 4.5 years for SXS and Xbar. |
| Pacific Bell | 5 years |

15. Mountain Bell and Pacific Northwest Bell proposed the procedure for essentially the same reasons as Illinois Bell did in 1984. The Colorado, Utah and Oregon Commissions agreed with the carriers that the amortization procedure should be used so that these carriers would have a better chance of recovering their embedded costs. Furthermore, these commissions stated that the

additional revenue requirement would not unduly burden ratepayers in their states. Accordingly, we adopt the amortization procedure for these states for the periods listed above.

16. Pacific Bell also proposed to switch from remaining-life rates to an amortization procedure because of the competitive nature of its business in California. The California Commission does not agree that an amortization procedure is necessary for Pacific Bell to achieve full capital recovery. It believes that the continued use of remaining-life rates will allow for full and timely recovery of Pacific Bell's costs. The California Commission further stated that the use of the amortization procedure proposed by Pacific Bell would place a large and unnecessary burden on the ratepayers in California. The User Group[4], a group of users of Pacific Bell's services, concurs with the California Commission's position. Although we make no determination here as to the competitive nature of Pacific Bell's markets, we defer to the state on the matter of the burden on the ratepayers. Accordingly, we will continue to prescribe remaining-life depreciation rates for Pacific Bell.

17. The Ohio Commission proposed the use of an amortization procedure that would slow the recovery of Cincinnati Bell's reserve imbalance. As stated in our final decision in Docket No. 20188, such an approach is not consistent with our general policy of allowing an opportunity for full depreciation over the life of the plant. Consistent with this policy, we cannot accept a slowed-down amortization procedure unless there are overriding concerns. Cincinnati Bell filed for the use of a different amortization procedure that would slightly accelerate the recovery of its reserve imbalance. However, it provided very little justification for the change to the amortization procedure, especially considering the increasing complexity of such a procedure. Accordingly, we adopt the continued use of the remaining-life procedure for Cincinnati Bell.

### *D. Effective Dates*

18. The companies in this order requested effective dates from January 1, 1985 to January 1, 1986. Inasmuch as no comments were filed in opposition to the requested effective dates and the companies' requests are within the provision of Section 43.43(e) of our Rules and Regulations, we grant the effective dates shown on the Appendix to the Order.

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[4] The American Broadcasting Companies, Inc., CBS Inc., the California Bankers Clearing House Association, and the Tele-Communications Association.

### *E. Composite Depreciation Rates*

19. In our 1983 depreciation prescription orders (see, e.g., Depreciation Rates, 96 FCC 2d 257 (1983), *reconsideration*, FCC Order 84-505, released October 31, 1984), we ordered the use of composite remaining-life depreciation rates. Composite rates were introduced to avoid the unnecessary complexity that would be introduced in coming years if we continued prescription of separate ELG rates for each new vintage of each account. Although we have stated repeatedly our preference for the use of one composite rate, in past years most of the BOCs have filed for three composite rates for each account: one for the original cost of the ELG vintages, one for the original cost of the VG vintages, and one for net salvage for the account as a whole, and we have prescribed three rates. After administering both procedures for two years, we have concluded that the three rate process is unnecessarily complex. The use of single, composite rates will not only simplify the depreciation rate prescription process, but it will enable our staff to review access charge and tariff filings and to perform audits more effectively. Accordingly, we are adopting single, composite rates in this Order.[5]

### *F. Annual Updates*

20. Due to the increased volatility of depreciation rates using the new procedures (i.e., equal life group and remaining-life) mandated in Docket No. 20188, since 1983, we have allowed the use of optional annual updates for all accounts to assure that depreciation rates would be kept current. These updates are designed to reflect depreciation rate changes necessitated by plant additions and retirements without altering the prescribed service life and net salvage estimates. We believe this practice should be continued to assure that depreciation rates are kept as up to date as possible between triennial depreciation filings.

### *G. Submission of Whole-Life Depreciation Studies*

21. Many of the carriers and state commissions have expressed concern regarding the depreciation reserve levels. Our staff believes the most cost effective way to monitor the reserve levels and their rates of change is for the carriers to provide all filings and studies on both a whole-life and remaining-life basis and that the whole-life and remaining-life parameters be determined on a

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[5] These composite rates may be accompanied with amortization amounts. See paragraphs 12-17.

consistent basis. The difference in the annual accruals determined using these two procedures is the rate at which the reserve deficit is being written down. Virtually all computer software used by the carriers can determine depreciation factors on both a whole-life and a remaining-life basis. Thus, very little additional costs will result from the continuation of this requirement. Thus, we agree with our staff that the carriers should continue to submit whole-life rates with their filings and that these whole-life and remaining-life rates must be calculated on a consistent basis.

### *H. Conclusion*

22. Having considered the carriers' proposals, the responses to the public notice and the recommendations of the staff, we adopt the rates and amortizations listed in the Appendix.

## *IV. ORDERING CLAUSES*

23. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), 201-205 and 220(b) of the Communications Act of 1934, as amended, 47 U.S.C. Secs. 151, 154(i), 201-205 and 220(b), That the percentages of depreciation and amortizations set forth in the Appendix to this Order are prescribed effective on the dates listed.

24. IT IS FURTHER ORDERED, That the companies shall submit to the Commission whole-life as well as remaining-life depreciation studies during the next represcription period.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

# *APPENDIX*

## FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
THE BELL TELEPHONE COMPANY OF PENNSYLVANIA

Effective November 1, 1985

| *Account No.* A | *Class or Subclass of Plant* B | *Average Remaining Life (years)* C | *Future Net Salvage (%)* D | *12/31/84 Book Reserve (%)* E | *Remaining Life Rate (%)* F | *First Year ELG* G |
|---|---|---|---|---|---|---|
| 212 | BUILDINGS | 34.0 | 2.0 | 20.0 | 2.3 | 1983 |
| 221 | COE — MANUAL | 3.0 | −9.0 | 81.0 | 9.3 | |
| 221 | COE STEP-BY-STEP* | 1.6 | −4.0 | 77.8 | 16.4 | |
| 221 | COE — CROSSBAR# | 1.6 | −10.0 | 87.7 | 13.9 | |
| 221 | COE — CIRCUIT — OTHER | 8.2 | 1.0 | 16.1 | 10.1 | 1982 |
| 221 | COE — CIRCUIT DDS | 8.5 | 1.0 | 26.1 | 8.6 | 1982 |
| 221 | COE — RADIO | 11.0 | 4.0 | 25.0 | 6.5 | 1982 |
| 221 | COE — ELECTRONIC — ANALOG | 13.0 | 3.0 | 10.1 | 6.7 | 1982 |
| 221 | COE — ELECTRONIC — DIGITAL | 12.8 | 3.0 | 9.4 | 6.8 | 1982 |
| 231 | STA APP — TELEPHONE & MISC | 6.0 | 2.0 | 35.9 | 10.4 | |
| 234 | LARGE PBX — OTHER | 8.4 | −2.0 | 88.5 | 1.6 | |
| 234 | LARGE PBX — DDS | 5.2 | 2.0 | 37.6 | 11.6 | |
| 235 | PUBLIC TELEPHONE EQUIPMENT | 5.5 | 2.0 | 32.4 | 11.9 | |
| 241 | POLE LINES | 24.0 | −60.0 | 34.6 | 5.2 | 1982 |
| 242.1 | AERIAL CABLE — OTHER | 15.2 | −9.0 | 22.9 | 5.7 | 1982 |
| 242.1 | AERIAL CABLE — BUILDINGS | 15.7 | −17.0 | 19.8 | 6.2 | 1982 |
| 242.2 | UNDERGROUND CABLE | 20.0 | 19.0 | 17.2 | 3.2 | 1982 |
| 242.3 | BURIED CABLE | 18.2 | −4.0 | 18.2 | 4.7 | 1982 |
| 242.4 | SUBMARINE CABLE | 7.9 | −10.0 | 93.7 | 2.1 | 1982 |
| 243 | AERIAL WIRE | 5.2 | −39.0 | 17.7 | 23.3 | 1982 |
| 244 | UNDERGROUND CONDUIT | 47.0 | −10.0 | 21.9 | 1.9 | 1982 |
| 261 | F&OE — FURN & OFC EQUIPMENT | 8.8 | 3.0 | 11.6 | 9.7 | 1983 |
| 261 | F&OE — COMPUTER & AMA | 4.1 | 5.0 | 28.5 | 16.2 | 1983 |
| 262 | OTHER COMMUNICATIONS EQPT | 6.1 | 1.0 | 33.7 | 10.7 | |
| 264 | VOWE — MOTOR VEHICLES | 4.2 | 20.0 | 41.8 | 9.1 | 1983 |
| 264 | VOWE — OTHER WORK EQUIPMENT | 11.6 | 1.0 | 17.2 | 7.1 | 1983 |

* Amortization of January 1, 1985 reserve imbalance: $7,264,000 per year for three years. Reserve percent shown in Column (E) is theoretical reserve percent.

# Amortization of January 1, 1985 reserve imbalance: $35,991,000 per year for three years. Reserve percent shown in Column (E) is theoretical reserve percent.

## FEDERAL COMMUNICATIONS COMMISSION
### Schedule of Annual Percentages of Depreciation for
## CINCINNATI BELL TELEPHONE COMPANY — KENTUCKY

Effective July 1, 1985

| *Account No.* | *Class or Subclass of Plant* | *Average Remaining Life (years)* | *Future Net Salvage (%)* | *12/31/84 Book Reserve (%)* | *Remaining Life Rate (%)* | *First Year ELG* |
|---|---|---|---|---|---|---|
| *A* | *B* | *C* | *D* | *E* | *F* | *G* |
| 212 | BUILDINGS | 27.0 | −4.0 | 27.0 | 2.9 | 1983 |
| 221 | COE — STEP-BY-STEP | 1.7 | −4.0 | 40.4 | 37.4 | |
| 221 | COE — CROSSBAR | 1.8 | −4.0 | 37.3 | 37.1 | |
| 221 | COE — CIRCUIT — DDS | 7.2 | −4.0 | 20.7 | 11.6 | 1982 |
| 221 | COE — CIRCUIT — NON-DDS | 8.6 | 8.0 | 17.6 | 8.7 | 1982 |
| 221 | COE — RADIO | 10.0 | −2.0 | 32.3 | 7.0 | 1982 |
| 221 | COE — ELECTRONIC — ANALOG | 17.4 | 3.0 | 14.7 | 4.7 | 1983 |
| 221 | COE — ELECTRONIC — DIGITAL | 15.7 | 3.0 | 7.7 | 5.7 | 1983 |
| 231 | STA APP — TELETYPEWRITER | 3.0 | 2.0 | 44.2 | 17.9 | |
| 231 | STA APP — TELE & MISC | 4.4 | 4.0 | 43.0 | 12.0 | |
| 234 | LARGE PBX — OTHER | 1.8 | −5.0 | 87.4 | 9.8 | |
| 234 | LARGE PBX — ELECTRONIC PBX | 3.9 | −1.0 | 46.5 | 14.0 | |
| 234 | LARGE PBX — DDS — PBX | 3.9 | −1.0 | 20.1 | 20.7 | |
| 235 | PUBLIC TELEPHONE | 6.7 | −50.0 | 36.8 | 16.9 | |
| 241 | POLE LINES | 19.0 | −16.0 | 39.4 | 4.0 | 1982 |
| 242.1 | AERIAL CABLE — HOUSE & BLOCK | 17.4 | −59.0 | 25.2 | 7.7 | 1985 |
| 242.1 | AERIAL CABLE — OTHER | 18.6 | −13.0 | 33.7 | 4.3 | 1982 |
| 242.2 | UNDERGROUND CABLE | 24.0 | −32.0 | 19.1 | 4.7 | 1982 |
| 242.3 | BURIED CABLE | 28.0 | −7.0 | 17.9 | 3.2 | 1982 |
| 242.4 | SUBMARINE CABLE | 15.0 | 0.0 | 100.0 | 0.0 | 1982 |
| 243 | AERIAL WIRE | 7.4 | −40.0 | 12.8 | 17.2 | |
| 244 | UNDERGROUND CONDUIT | 44.0 | −15.0 | 15.9 | 2.3 | 1982 |
| 261 | F&OE — FURNITURE | 14.8 | 5.0 | 15.7 | 5.4 | 1983 |
| 262 | OTHER COMMUNICATIONS EQPT | 4.5 | 2.0 | 59.4 | 8.6 | |
| 264 | VOWE — MOTOR VEHICLES | 4.7 | 28.0 | 53.4 | 4.0 | 1983 |
| 264 | VOWE — OTHER WORK EQUIPMENT | 16.2 | 6.0 | 37.9 | 3.5 | 1983 |

## FEDERAL COMMUNICATIONS COMMISSION
### Schedule of Annual Percentages of Depreciation for
### CINCINNATI BELL TELEPHONE COMPANY — OHIO/INDIANA
Effective July 1, 1985

| *Account No.* | *Class or Subclass of Plant* | *Average Remaining Life (years)* | *Future Net Salvage (%)* | *12/31/84 Book Reserve (%)* | *Remaining Life Rate (%)* | *First Year ELG* |
|---|---|---|---|---|---|---|
| *A* | *B* | *C* | *D* | *E* | *F* | *G* |
| 212 | BUILDINGS | 34.0 | −1.0 | 18.4 | 2.4 | 1983 |
| 221 | COE — MANUAL | 3.9 | −13.0 | 55.3 | 14.8 | |
| 221 | COE — STEP-BY-STEP+ | — | 0.0 | — | — | |
| 221 | COE — CROSSBAR | 3.3 | −4.0 | 55.9 | 14.6 | |
| 221 | COE — CIRCUIT — DDS | 7.8 | −4.0 | 24.5 | 10.2 | 1982 |
| 221 | COE — CIRCUIT — NON DDS | 8.7 | 8.0 | 16.9 | 8.6 | 1982 |
| 221 | COE — RADIO | 8.5 | −5.0 | 34.1 | 8.3 | 1982 |
| 221 | COE — ELECTRONIC — ANALOG | 13.1 | 3.0 | 16.3 | 6.2 | 1983 |
| 221 | COE — ELECTRONIC — DIGITAL | 17.1 | 3.0 | 8.8 | 5.2 | 1983 |
| 231 | STA APP — TELETYPEWRITER | 3.3 | 2.0 | 8.4 | 27.2 | |
| 231 | STA APP — TELE & MISC | 4.4 | 4.0 | 39.9 | 12.8 | |
| 234 | LARGE PBX — OTHER | 1.8 | −5.0 | 93.9 | 6.2 | |
| 234 | LARGE PBX — ELECTRONIC PBX | 3.8 | −1.0 | 43.3 | 15.2 | |
| 234 | LARGE PBX — DDS — PBX | 4.9 | −1.0 | 30.7 | 14.3 | |
| 235 | PUBLIC TELEPHONE | 6.7 | −36.0 | 36.4 | 14.9 | |
| 241 | POLE LINES | 19.4 | −3.0 | 39.8 | 3.3 | 1982 |
| 242.1 | AERIAL CABLE — HOUSE & BLOCK | 17.6 | −57.0 | 25.5 | 7.5 | 1985 |
| 242.1 | AERIAL CABLE — OTHER | 18.7 | −20.0 | 36.0 | 4.5 | 1982 |
| 242.2 | UNDERGROUND CABLE | 24.0 | −12.0 | 22.2 | 3.7 | 1982 |
| 242.3 | BURIED CABLE | 28.0 | −3.0 | 18.9 | 3.0 | 1982 |
| 242.4 | SUBMARINE CABLE | 15.3 | 0.0 | 76.2 | 1.6 | 1982 |
| 243 | AERIAL WIRE | 9.0 | −47.0 | 64.5 | 9.2 | |
| 244 | UNDERGROUND CONDUIT | 44.0 | −15.0 | 23.0 | 2.1 | 1982 |
| 261 | F&OE — FURNITURE | 14.6 | 5.0 | 8.1 | 6.0 | 1983 |
| 261 | F&OE — COMPUTER & AMA | 5.7 | 5.0 | 39.4 | 9.8 | 1983 |
| 262 | OTHER COMMUNICATIONS EQPT | 4.2 | 2.0 | 41.1 | 13.5 | |
| 264 | VOWE — MOTOR VEHICLES | 4.7 | 20.0 | 42.1 | 8.1 | 1983 |
| 264 | VOWE — OTHER WORK EQUIPMENT | 18.2 | 6.0 | 20.7 | 4.0 | 1983 |

+Amortization of January 1, 1985 net book balance: $324,000 per year for three years.

### FEDERAL COMMUNICATIONS COMMISSION
### Schedule of Annual Percentages of Depreciation for
### CITIZENS UTILITIES COMPANY OF CALIFORNIA

Effective January 1, 1985

| *Account No.* | *Class or Subclass of Plant* | *Average Remaining Life (years)* | *Future Net Salvage (%)* | *12/31/84 Book Reserve (%)* | *Remaining Life Rate (%)* | *First Year ELG* |
|---|---|---|---|---|---|---|
| *A* | *B* | *C* | *D* | *E* | *F* | *G* |
| 212 | BUILDINGS | 40.0 | 0.0 | 10.0 | 2.3 | 1984 |
| 221 | COE — STEP-BY-STEP | 2.4 | -5.0 | 49.3 | 23.2 | |
| 221 | COE — CIRCUIT | 8.6 | 3.0 | 32.8 | 7.5 | 1984 |
| 221 | COE — RADIO | 12.2 | 0.0 | 31.4 | 5.6 | 1984 |
| 221 | COE — ELECTRONIC | 14.0 | 1.0 | 31.5 | 4.8 | 1984 |
| 231.1 | STA APP — CPE* | — | 5.0 | — | — | |
| 231 | STA APP — OTHER | 4.5 | 0.0 | 27.2 | 16.2 | 1984 |
| 234.1 | LARGE PBX# | — | 0.0 | — | — | |
| 234 | EMERGENCY REPORTING EQPT | 5.4 | 0.0 | 48.4 | 9.6 | |
| 235 | PUBLIC TELEPHONE — COIN | 7.2 | 1.0 | 39.6 | 8.3 | |
| 235 | PUBLIC TELEPHONE — COINLESS | 9.9 | 1.0 | 3.2 | 9.7 | |
| 235 | PUBLIC TELEPHONE — BOOTHS | 11.5 | 1.0 | 29.6 | 6.0 | |
| 241 | POLE LINES | 22.0 | -70.0 | 40.0 | 5.9 | 1984 |
| 242.1 | AERIAL CABLE | 17.4 | -16.0 | 17.4 | 5.7 | 1984 |
| 242.2 | UNDERGROUND CABLE | 22.0 | -4.0 | 10.3 | 4.3 | 1984 |
| 242.3 | BURIED CABLE | 19.0 | -8.0 | 17.7 | 4.8 | 1984 |
| 243 | AERIAL WIRE | 8.5 | -70.0 | 41.2 | 15.2 | 1984 |
| 244 | UNDERGROUND CONDUIT | 49.0 | -2.0 | 13.9 | 1.8 | 1984 |
| 261 | F&OE — FURNITURE & OFC EQPT | 18.5 | 3.0 | 29.0 | 3.7 | 1984 |
| 261 | F&OE — COMPUTERS | 8.2 | 0.0 | 5.2 | 11.6 | 1984 |
| 262 | OCE — OTHER COMM EQPT | 10.2 | 0.0 | 47.9 | 5.1 | |
| 262 | OCE — LARGE PBX | 5.4 | 0.0 | 45.4 | 10.1 | |
| 264 | VOWE — MOTOR VEHICLES | 5.0 | 12.0 | 46.8 | 8.2 | 1984 |
| 264 | VOWE — TOOLS | 11.3 | 4.0 | 32.9 | 5.6 | 1984 |

* Three-year amortization of January 1, 1985 new book balance: $674,000 per year for three years; with consideration for FNS % in Column (D).

# Three-year amortization of January 1, 1985 net book balance: $90,000 per year for three years.

## FEDERAL COMMUNICATIONS COMMISSION
### Schedule of Annual Percentages of Depreciation for
### CONTINENTAL TELEPHONE COMPANY OF CALIFORNIA

Effective May 1, 1985

| *Account No.* | *Class or Subclass of Plant* | *Averge Remaining Life (years)* | *Future Net Salvage (%)* | *12/31/84 Book Reserve (%)* | *Remaining Life Rate (%)* | *First Year ELG* |
|---|---|---|---|---|---|---|
| *A* | *B* | *C* | *D* | *E* | *F* | *G* |
| 212 | BUILDINGS | 19.9 | – 4.0 | 31.9 | 3.6 | 1985 |
| 221 | COE – OTHER | 4.2 | 1.0 | 37.0 | 14.8 | |
| 221 | COE – SWITCHBOARD | 3.4 | – 1.0 | 75.9 | 7.4 | |
| 221 | COE – MICROWAVE | 9.5 | – 1.0 | 31.0 | 7.4 | 1985 |
| 221 | COE – CIRCUIT | 10.4 | 2.0 | 22.7 | 7.2 | 1985 |
| 221 | COE – DIGITAL (EX. VIDAR) | 15.7 | 0.0 | 5.8 | 6.0 | 1985 |
| 221 | COE – DIGITAL (VIDAR)* | — | 0.0 | — | — | |
| 231 | STA APP – OTHER | 6.6 | 0.0 | 19.2 | 12.2 | |
| 231 | STA APP – CPE# | — | 0.0 | — | — | |
| 234 | LARGE PBX – CPE# | — | 0.0 | — | — | |
| 235 | PUBLIC TELEPHONE – COIN | 6.6 | 0.0 | 16.0 | 12.7 | |
| 241 | POLE LINES | 16.6 | – 20.0 | 22.6 | 5.9 | 1985 |
| 242.1 | AERIAL CABLE & DROP | 12.9 | – 10.0 | 31.3 | 6.1 | 1985 |
| 242.2 | UNDERGROUND CABLE | 23.0 | – 4.0 | 17.4 | 3.8 | 1985 |
| 242.3 | BURIED CABLE & DROP | 21.0 | – 1.0 | 17.5 | 4.0 | 1985 |
| 242.4 | SUBMARINE CABLE | 12.4 | 0.0 | 58.8 | 3.3 | |
| 243 | AERIAL WIRE | 2.4 | – 30.0 | – 54.5 | 76.9 | |
| 244 | UNDERGROUND CONDUIT | 40.0 | – 5.0 | 21.0 | 2.1 | 1985 |
| 261 | FURNITURE & OFC EQPT – MAJOR | 17.0 | 8.0 | – 2.3 | 5.5 | |
| 261 | FURNITURE & OFC EQPT – INFO | 6.0 | 0.0 | 2.1 | 16.3 | |
| 262 | OFFICIAL COMMUNICATIONS EQPT | 6.6 | 0.0 | 25.2 | 11.3 | |
| 264 | VEH & OTH WORK EQPT – MAJOR | 9.0 | 20.0 | 87.2 | 0.0 | |
| 264 | AIRCRAFT | 2.0 | 48.0 | 33.6 | 9.2 | |

* Amortization of January 1, 1985 monthly net book over five years.
# Amortization of January 1, 1985 monthly net book over three years.

## FEDERAL COMMUNICATIONS COMMISSION
### Schedule of Annual Percentages of Depreciation for
### CONTINENTAL TELEPHONE COMPANY OF NEW YORK

Effective November 1, 1985

| *Account No.* | *Class or Subclass of Plant* | *Average Remaining Life (years)* | *Future Net Salvage (%)* | *12/31/84 Book Reserve (%)* | *Remaining Life Rate (%)* | *First Year ELG* |
|---|---|---|---|---|---|---|
| *A* | *B* | *C* | *D* | *E* | *F* | *G* |
| 212 | BUILDINGS | 25.0 | 2.0 | 28.1 | 2.8 | |
| 212 | LEASEHOLD | 7.8 | 0.0 | 14.1 | 11.0 | |
| 221 | COE — STEP-BY-STEP | 3.1 | 3.0 | 59.5 | 12.1 | |
| 221 | COE — MOBILE | 2.5 | 0.0 | 78.2 | 8.7 | |
| 221 | COE — SWITCHBOARD | 3.5 | 0.0 | 65.7 | 9.8 | |
| 221 | COE — ANALOG ELECTRONIC | 5.5 | 0.0 | 24.6 | 13.7 | |
| 221 | COE — MICROWAVE | 5.2 | 0.0 | 65.2 | 6.7 | |
| 221 | COE — POWER | 5.1 | 2.0 | 49.7 | 9.5 | |
| 221 | COE — CIRCUIT | 8.5 | 5.0 | 27.3 | 8.0 | 1985 |
| 221 | COE — ANI/TICKETING | — | 1.0 | 90.4 | 0.0 | |
| 221 | COE — DIGITAL | 14.3 | 0.0 | 8.8 | 6.4 | 1985 |
| 231 | STA APP — DEREGULATED | — | — | — | 12.1 | |
| 231 | STA APP — HARD OF HEARING | — | — | — | 12.1 | |
| 234 | LARGE PBX | — | 8.0 | 92.1 | 0.0 | |
| 235 | PUBLIC TELEPHONE EQUIPMENT | 5.4 | 0.0 | 51.1 | 9.1 | |
| 241 | POLE LINES | 19.3 | -30.0 | 29.8 | 5.2 | 1985 |
| 242.1 | AERIAL CABLE | 19.7 | -16.0 | 30.7 | 4.3 | 1985 |
| 242.2 | UNDERGROUND CABLE | 22.0 | -15.0 | 28.2 | 3.9 | 1985 |
| 242.3 | BURIED CABLE | 24.0 | -2.0 | 16.3 | 3.6 | 1985 |
| 242.4 | SUBMARINE CABLE | 19.0 | -2.0 | 26.0 | 4.0 | 1985 |
| 243 | AERIAL WIRE | 3.4 | -52.0 | -3.2 | 45.6 | |
| 244 | UNDERGROUND CONDUIT | 33.0 | -3.0 | 29.6 | 2.2 | 1985 |
| 261 | F&OE — FURNITURE & OFC EQPT | 15.1 | 10.0 | 40.5 | 3.3 | |
| 262 | OFFICIAL TERMINAL EQUIPMENT | 7.5 | 0.0 | 29.5 | 9.4 | |
| 264 | VOWE — MOTOR VEHICLES | — | 16.0 | 84.0 | 0.0 | |
| 264 | VOWE — OTHER WORK EQUIPMENT | 9.9 | 6.0 | 65.4 | 2.9 | |

## FEDERAL COMMUNICATIONS COMMISSION
### Schedule of Annual Percentages of Depreciation for
### THE DIAMOND STATE TELEPHONE COMPANY

**Effective July 1, 1985**

| *Account No.* | *Class or Subclass of Plant* | *Average Remaining Life (years)* | *Future Net Salvage (%)* | *12/31/84 Book Reserve (%)* | *Remaining Life Rate (%)* | *First Year ELG* |
|---|---|---|---|---|---|---|
| *A* | *B* | *C* | *D* | *E* | *F* | *G* |
| 212 | BUILDINGS | 32.0 | 3.0 | 20.0 | 2.4 | 1983 |
| 221 | COE —STEP-BY-STEP * | — | — | — | 20.6 | |
| 221 | COE — CROSSBAR # | — | −7.0 | — | — | |
| 221 | COE — CIRCUIT —OTHER | 7.8 | 4.0 | 18.2 | 10.0 | 1983 |
| 221 | COE — CIRBUIT —DDS | 8.7 | −4.0 | 16.3 | 10.1 | 1983 |
| 221 | COE — RADIO | 11.3 | 0.0 | 22.0 | 6.9 | 1983 |
| 221 | COE — ELECTRONIC — ANALOG | 11.9 | 0.0 | 9.3 | 7.6 | 1983 |
| 221 | COE — ELECTRONIC — DIGITAL | 12.7 | 5.0 | 6.5 | 7.0 | 1983 |
| 231 | STA APP — TELE & MISC | 5.3 | 1.0 | −13.1 | 21.2 | |
| 234 | LARGE PBX — OTHER | 5.8 | 1.0 | 32.9 | 11.4 | |
| 234 | LARGE PBX — DDS | 8.4 | −3.0 | 62.2 | 4.9 | |
| 235 | PUBLIC TELEPHONE | 5.4 | 2.0 | 32.9 | 12.1 | |
| 241 | POLE LINES | 26.0 | −90.0 | 57.4 | 5.1 | 1982 |
| 242.1 | AERIAL CABLE —OTHER | 12.0 | −10.0 | 26.8 | 6.9 | 1982 |
| 242.1 | AERIAL CABLE —BUILDINGS | 14.8 | −11.0 | 27.9 | 5.6 | 1982 |
| 242.2 | UNDERGROUND CABLE | 20.0 | 8.0 | 14.6 | 3.9 | 1982 |
| 242.3 | BURIED CABLE | 21.0 | −3.0 | 20.0 | 4.0 | 1982 |
| 242.4 | SUBMARINE CABLE | 14.9 | 0.0 | 36.2 | 4.3 | 1982 |
| 243 | AERIAL WIRE | 6.4 | −38.0 | −214.2 | 55.0 | 1982 |
| 244 | UNDERGROUND CONDUIT | 50.0 | −15.0 | 17.6 | 1.9 | 1982 |
| 261 | F&OE — FURNITURE & OPC EQPT | 10.6 | 5.0 | 22.6 | 6.8 | 1983 |
| 261 | F&OE — COMPUTER & AMA | 4.8 | 8.0 | 17.3 | 15.6 | 1983 |
| 262 | OTHER COMMUNICATIONS EQPT | 5.4 | −1.0 | 17.5 | 15.5 | |
| 264 | VOWE — MOTOR VEHICLES | 4.0 | 25.0 | 42.9 | 8.0 | 1983 |
| 264 | VOWE — OTHER WORK EQUIPMENT | 9.7 | 2.0 | 18.0 | 8.2 | 1983 |

* Amortization of reserve shortfall as of January 1, 1985: $92,000 per month for 18 months.

# Amortization of July 1, 1985 monthly net book balance over twelve months. Begin with July 1, 1985 net book included −1% allowance for FNS.

## FEDERAL COMMUNICATIONS COMMISSION
### Schedule of Annual Percentages of Depreciation for
### GENERAL TELEPHONE COMPANY OF THE NORTHWEST, INC. — IDAHO

**Effective January 1, 1986**

| *Account No.* A | *Class or Subclass of Plant* B | *Average Remaining Life (years)* C | *Future Net Salvage (%)* D | *12/31/84 Book Reserve (%)* E | *Remaining Life Rate (%)* F | *First Year ELG* G |
|---|---|---|---|---|---|---|
| 212 | BUILDINGS | 25.0 | 9.0 | 19.9 | 2.8 | 1984 |
| 221 | COE — MANUAL EQUIPMENT | 6.5 | −3.0 | −15.3 | 18.2 | |
| 221 | COE — ELECTROMECH SWITCHING | 3.9 | −4.0 | 36.4 | 17.3 | |
| 221 | COE — DIGITAL SWITCHING EQPT | 14.4 | 3.0 | 12.5 | 5.9 | 1983 |
| 221 | COE — AUTO MESSAGE RECORDING | 3.7 | 0.0 | 39.0 | 16.5 | |
| 221 | COE — CIRCUIT EQUIPMENT | 8.9 | 7.0 | 22.2 | 8.0 | 1983 |
| 221 | COE — RADIO | 9.7 | 0.0 | 25.9 | 7.6 | 1983 |
| 231 | STA APP — TELEPHONES | — | — | — | 12.9 | |
| 231 | STA APP — TELETYPEWRITER | — | — | — | 10.4 | |
| 231 | STA APP — RADIOTELEPHONE | — | — | — | 10.6 | |
| 234 | LARGE PBX | — | — | — | 18.0 | |
| 235 | STA APP — COIN TELEPHONE | 4.8 | 0.0 | 49.1 | 10.6 | |
| 235 | STA APP —COINLESS TELEPHONE | 4.8 | 0.0 | 49.1 | 10.6 | |
| 241 | POLE LINES | 11.2 | −50.0 | 13.4 | 12.2 | 1983 |
| 242.1 | AERIAL CABLE | 16.1 | −21.0 | 27.5 | 5.8 | 1983 |
| 242.2 | UNDERGROUND CABLE | 23.0 | −12.0 | 16.2 | 4.2 | 1983 |
| 242.3 | BURIED CABLE | 22.0 | −10.0 | 18.9 | 4.1 | 1983 |
| 242.4 | SUBMARINE CABLE | 10.3 | 0.0 | 30.1 | 6.8 | 1983 |
| 243 | AERIAL WIRE | 6.7 | −50.0 | −22.9 | 25.8 | |
| 244 | UNDERGROUND CONDUIT | 42.0 | 0.0 | 16.2 | 2.0 | 1983 |
| 261 | F&OE — FURNITURE | 12.7 | 5.0 | 13.3 | 6.4 | 1984 |
| 261 | F&OE — OFFICE EQUIPMENT | 7.9 | 5.0 | 23.0 | 9.1 | 1984 |
| 261 | F&OE — DATA PROCESSING EQPT | 4.6 | 10.0 | 5.7 | 18.3 | 1984 |
| 262 | OTHER COMMUNICATIONS EQPT | 4.6 | 0.0 | 29.3 | 15.4 | |
| 264 | VOWE — MOTOR VEHICLES | 4.1 | 15.0 | 44.1 | 10.0 | 1984 |
| 264 | VOWE — MOTOR VEH SHOP EQPT | 9.9 | 10.0 | 17.0 | 7.4 | 1984 |
| 264 | VOWE —TOOLS & WORK EQPT | 10.7 | 10.0 | 30.8 | 5.5 | 1984 |

### FEDERAL COMMUNICATIONS COMMISSION
### Schedule of Annual Percentages of Depreciation for
### GENERAL TELEPHONE COMPANY OF THE NORTHWEST, INC. — MONTANA

Effective January 1, 1986

| *Account No.*<br>*A* | *Class or Subclass of Plant*<br>*B* | *Average Remaining Life (years)*<br>*C* | *Future Net Salvage (%)*<br>*D* | *12/31/84 Book Reserve (%)*<br>*E* | *Remaining Life Rate (%)*<br>*F* | *First Year ELG*<br>*G* |
|---|---|---|---|---|---|---|
| 212 | BUILDINGS | 24.0 | 9.0 | 24.3 | 2.8 | 1984 |
| 221 | COE — MANUAL EQUIPMENT | — | — | — | — | |
| 221 | COE — ELECTROMECH SWITCHING | 8.1 | −1.0 | 43.2 | 7.1 | |
| 221 | COE — AUTO MESSAGE RECORDING | 8.1 | −1.0 | 51.5 | 6.1 | |
| 221 | COE — CIRCUIT EQUIPMENT | 9.5 | 4.0 | 35.8 | 6.3 | 1983 |
| 221 | COE — RADIO | 7.2 | −5.0 | 77.7 | 3.8 | 1983 |
| 231 | STA APP —TELEPHONES | — | — | — | 13.4 | |
| 231 | STA APP — TELETYPEWRITER | — | — | — | 10.5 | |
| 234 | LARGE PBX | — | — | — | 12.0 | |
| 235 | STA APP — COIN TELEPHONE | 4.0 | 0.0 | 48.6 | 12.9 | |
| 235 | STA APP — COINLESS TELEPHONE | 4.0 | 0.0 | 48.6 | 12.9 | |
| 241 | POLE LINES | 8.2 | −60.0 | 5.8 | 18.8 | 1983 |
| 242.1 | AERIAL CABLE | 12.8 | −35.0 | 32.3 | 8.0 | 1983 |
| 242.2 | UNDERGROUND CABLE | 21.0 | −20.0 | 3.4 | 5.6 | 1983 |
| 242.3 | BURIED CABLE | 22.0 | −15.0 | 17.1 | 4.5 | 1983 |
| 243 | AERIAL WIRE | 5.5 | −65.0 | −89.2 | 46.2 | |
| 244 | UNDERGROUND CONDUIT | 44.0 | 0.0 | 13.5 | 2.0 | 1983 |
| 261 | F&OE — FURNITURE | 12.7 | 5.0 | 34.6 | 4.8 | 1984 |
| 261 | F&OE — OFFICE EQUIPMENT | 7.9 | 5.0 | 69.7 | 3.2 | 1984 |
| 261 | F&OE — DATA PROCESSING EQPT | 4.6 | 10.0 | 82.5 | 1.6 | 1984 |
| 262 | OTHER COMMUNICATIONS EQPT | 4.6 | 0.0 | 35.5 | 14.0 | |
| 264 | VOWE — MOTOR VEHICLES | 3.6 | 14.0 | 45.8 | 11.2 | 1984 |
| 264 | VOWE —TOOLS & WORK EQPT | 10.7 | 5.0 | 10.5 | 7.9 | 1984 |

## FEDERAL COMMUNICATIONS COMMISSION
### Schedule of Annual Percentages of Depreciation for
### GENERAL TELEPHONE COMPANY OF THE NORTHWEST, INC. — OREGON

Effective January 1, 1986

| Account No. | Class or Subclass of Plant | Average Remaining Life (years) | Future Net Salvage (%) | 12/31/84 Book Reserve (%) | Remaining Life Rate (%) | First Year ELG |
|---|---|---|---|---|---|---|
| A | B | C | D | E | F | G |
| 212 | BUILDINGS | 33.0 | 13.0 | 15.4 | 2.2 | 1984 |
| 221 | COE — MANUAL EQUIPMENT | 5.4 | −3.0 | −13.4 | 16.6 | |
| 221 | COE — ELECTROMECH SWITCHING | 2.4 | −1.0 | 37.6 | 26.4 | |
| 221 | COE — ELECTRONIC SWITCHING | 5.4 | −1.0 | 40.2 | 11.3 | 1982 |
| 221 | COE — DIGITAL SWITCHING EQPT | 12.9 | 2.0 | 11.4 | 6.7 | 1982 |
| 221 | COE — AUTO MESSAGE RECORDING | 2.0 | 0.0 | 28.7 | 35.7 | |
| 221 | COE — CIRCUIT EQUIPMENT | 7.8 | 7.0 | 24.2 | 8.8 | 1982 |
| 221 | COE — RADIO | 9.1 | 0.0 | 41.1 | 6.5 | 1982 |
| 231 | STA APP — TELEPHONES | — | — | — | 15.4 | |
| 231 | STA APP — TELETYPEWRITER | — | — | — | 9.6 | |
| 231 | STA APP — RADIOTELEPHONE | — | — | — | 9.4 | |
| 234 | LARGE PBX | — | — | — | 15.0 | |
| 235 | STA APP — COIN TELEPHONE | 4.0 | 0.0 | 59.6 | 10.1 | |
| 235 | STA APP — COINLESS TELEPHONE | 4.0 | 0.0 | 59.6 | 10.1 | |
| 241 | POLE LINES | 15.2 | −65.0 | 33.3 | 8.7 | 1982 |
| 242.1 | AERIAL CABLE | 15.0 | −35.0 | 29.3 | 7.0 | 1982 |
| 242.2 | UNDERGROUND CABLE | 22.0 | −20.0 | 18.9 | 4.6 | 1982 |
| 242.3 | BURIED CABLE | 19.3 | −10.0 | 23.1 | 4.5 | 1982 |
| 242.4 | SUBMARINE CABLE | 10.3 | 0.0 | 70.8 | 2.8 | 1982 |
| 243 | AERIAL WIRE | 9.3 | −65.0 | 58.0 | 11.5 | |
| 244 | UNDERGROUND CONDUIT | 43.0 | 0.0 | 13.9 | 2.0 | 1982 |
| 261 | F&OE — FURNITURE | 12.7 | 15.0 | 32.5 | 4.1 | 1984 |
| 261 | F&OE — OFFICE EQUIPMENT | 9.4 | 10.0 | 33.2 | 6.0 | 1984 |
| 261 | F&OE — DATA PROCESSING EQPT | 4.6 | 10.0 | 11.7 | 17.0 | 1984 |
| 262 | OTHER COMMUNICATIONS EQPT | 4.6 | 0.0 | 37.1 | 13.7 | |
| 264 | VOWE — MOTOR VEHICLES | 3.9 | 17.0 | 58.0 | 6.4 | 1984 |
| 264 | VOWE — MOTOR VEH SHOP EQPT | 9.9 | 7.0 | 23.5 | 7.0 | 1984 |
| 264 | VOWE — TOOLS & WORK EQPT | 10.7 | 7.0 | 27.0 | 6.2 | 1984 |

## FEDERAL COMMUNICATIONS COMMISSION
### Schedule of Annual Percentages of Depreciation for
### GENERAL TELEPHONE COMPANY OF THE NORTHWEST, INC. — WASHINGTON

**Effective January 1, 1986**

| *Account No.*<br>*A* | *Class or Subclass of Plant*<br>*B* | *Average Remaining Life (years)*<br>*C* | *Future Net Salvage (%)*<br>*D* | *12/31/84 Book Reserve (%)*<br>*E* | *Remaining Life Rate (%)*<br>*F* | *First Year ELG*<br>*G* |
|---|---|---|---|---|---|---|
| 212 | BUILDINGS | 28.0 | 14.0 | 14.5 | 2.6 | 1984 |
| 221 | COE — MANUAL EQUIPMENT | 6.1 | −3.0 | 2.5 | 16.5 | |
| 221 | COE — ELECTROMECH SWITCH* | — | −2.0 | — | — | |
| 221 | COE — ELECTRONIC SWITCHING | 10.4 | 2.0 | 14.9 | 8.0 | 1983 |
| 221 | COE — DIGITAL SWITCHING EQPT | 12.8 | 5.0 | 8.6 | 6.8 | 1983 |
| 221 | COE — AUTO MSG RECORDING# | — | −2.0 | — | — | |
| 221 | COE — CIRCUIT EQUIPMENT | 9.3 | 7.0 | 20.8 | 7.8 | 1983 |
| 221 | COE — RADIO | 8.4 | 0.0 | 25.2 | 8.9 | 1983 |
| 231 | STA APP — TELEPHONES | — | — | — | 14.1 | |
| 231 | STA APP — TELETYPEWRITER | — | — | — | 11.1 | |
| 231 | STA APP — RADIOTELEPHONE | — | — | — | 10.9 | |
| 234 | LARGE PBX | — | — | — | 17.2 | |
| 235 | STA APP — COIN TELEPHONE | 4.0 | 0.0 | 59.2 | 10.2 | |
| 235 | STA APP — COINLESS TELEPHONE | 4.0 | 0.0 | 59.2 | 10.2 | |
| 241 | POLE LINES | 17.4 | −76.0 | 29.0 | 8.4 | 1983 |
| 242.1 | AERIAL CABLE | 15.8 | −15.0 | 27.2 | 5.6 | 1983 |
| 242.2 | UNDERGROUND CABLE | 21.0 | −20.0 | 20.7 | 4.7 | 1983 |
| 242.3 | BURIED CABLE | 19.9 | −5.0 | 20.9 | 4.2 | 1983 |
| 242.4 | SUBMARINE CABLE | 10.3 | 0.0 | 47.8 | 5.1 | 1983 |
| 243 | AERIAL WIRE | 6.6 | −60.0 | −82.3 | 36.7 | |
| 244 | UNDERGROUND CONDUIT | 41.0 | 0.0 | 18.2 | 2.0 | 1983 |
| 261 | F&OE — FURNITURE | 12.7 | 5.0 | 20.6 | 5.9 | 1984 |
| 261 | F&OE — OFFICE EQUIPMENT | 9.4 | 5.0 | 20.1 | 8.0 | 1984 |
| 261 | F&OE — DATA PROCESSING EQPT | 4.6 | 10.0 | 17.7 | 15.7 | 1984 |
| 262 | OTHER COMMUNICATIONS EQPT | 4.6 | 0.0 | 58.2 | 9.1 | |
| 264 | VOWE — MOTOR VEHICLES | 4.0 | 19.0 | 53.3 | 6.9 | 1984 |
| 264 | VOWE — MOTOR VEH SHOP EQPT | 9.9 | 5.0 | 29.6 | 6.6 | 1984 |
| 264 | VOWE — TOOLS & WORK EQPT | 10.7 | 5.0 | 23.5 | 6.7 | 1984 |

* Amortization of net book balance at January 1, 1986: estimated amount of $9,005,000 per year for four years; with consideration for FNS% in Column (D).

# Amortization of net book balance at January 1, 1986: estimated amount of $924,000 per year for four years; with consideration for FNS% in Column (D).

### FEDERAL COMMUNICATIONS COMMISSION
### Schedule of Annual Percentages of Depreciation for
### GENERAL TELEPHONE COMPANY OF THE SOUTHEAST – ALABAMA

**Effective January 1, 1986**

| *Account No.*<br>*A* | *Class or Subclass of Plant*<br>*B* | *Average Remaining Life (years)*<br>*C* | *Future Net Salvage (%)*<br>*D* | *12/31/84 Book Reserve (%)*<br>*E* | *Remaining Life Rate (%)*<br>*F* | *First Year ELG*<br>*G* |
|---|---|---|---|---|---|---|
| 212 | BUILDINGS | 31.0 | 10.0 | 18.8 | 2.3 | 1984 |
| 221 | COE – MANUAL SWITCHING | 2.5 | 0.0 | 100.0 | — | |
| 221 | COE – AUTOMATIC SWITCHING | 3.4 | 1.0 | 51.1 | 14.1 | |
| 221 | COE – A.M.R.E. | 1.4 | 3.0 | 80.2 | 12.0 | |
| 221 | COE – AUTO SWITCHING – DIG | 14.5 | 5.0 | 11.1 | 5.8 | 1983 |
| 221 | COE – CIRCUIT | 8.0 | 5.0 | 29.3 | 8.2 | 1983 |
| 221 | COE – RADIO | 7.9 | -1.0 | 35.9 | 8.2 | 1983 |
| 231 | STA APP – TELEPHONE | — | — | — | 14.2 | |
| 231 | STA APP – TELETYPEWRITER | — | — | — | 10.6 | |
| 231 | STA APP – RADIOTELEPHONE | — | — | — | 0.0 | |
| 234 | LARGE PBX | — | — | — | 15.3 | |
| 235 | COIN TELEPHONE | — | — | — | 14.2 | |
| 241 | POLE LINES | 14.9 | -32.0 | 34.3 | 6.6 | 1983 |
| 242.1 | AERIAL CABLE | 19.1 | -16.0 | 35.2 | 4.2 | 1983 |
| 242.1 | AERIAL FIBER | 23.0 | -16.0 | 1.3 | 5.0 | 1983 |
| 242.2 | UNDERGROUND CABLE | 20.0 | -8.0 | 16.7 | 4.6 | 1983 |
| 242.2 | UNDERGROUND FIBER | 21.0 | -8.0 | 7.6 | 4.8 | 1983 |
| 242.3 | BURIED CABLE | 12.3 | -5.0 | 21.6 | 6.8 | 1983 |
| 242.3 | BURRIED FIBER | 16.2 | -5.0 | 5.1 | 6.2 | 1983 |
| 242.4 | SUBMARINE CABLE | 23.0 | -5.0 | 3.9 | 4.4 | 1983 |
| 243 | AERIAL WIRE | 4.2 | -37.0 | -21.8 | 37.8 | |
| 244 | UNDERGROUND CONDUIT | 48.0 | -1.0 | 22.1 | 1.6 | 1983 |
| 261 | FURNITURE & FIXTURES | 11.7 | 6.0 | 31.6 | 5.3 | 1984 |
| 261 | OFFICE MACHINES | 8.9 | 20.0 | 35.3 | 5.0 | 1984 |
| 261 | COMPUTERS | 5.0 | 0.0 | 8.9 | 18.2 | 1984 |
| 262 | OTHER COMMUNICATIONS EQPT | — | — | — | 12.6 | |
| 264 | MOTOR VEHICLES | 5.2 | 25.0 | 42.2 | 6.3 | 1984 |
| 264 | MOTOR VEHICLES SHOP EQPT | 7.4 | 2.0 | 0.7 | 13.1 | 1984 |
| 264 | TOOLS | 14.4 | 3.0 | 28.0 | 4.8 | 1984 |

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
GENERAL TELEPHONE COMPANY OF THE SOUTHEAST — NORTH CAROLINA

Effective January 1, 1986

| *Account No.* | *Class or Subclass of Plant* | *Average Remaining Life (years)* | *Future Net Salvage (%)* | *12/31/84 Book Reserve (%)* | *Remaining Life Rate (%)* | *First Year ELG* |
|---|---|---|---|---|---|---|
| *A* | *B* | *C* | *D* | *E* | *F* | *G* |
| 212 | BUILDINGS | 36.0 | 10.0 | 9.8 | 2.2 | 1984 |
| 221 | COE — SWBD. EQPT — DIGITAL | 2.5 | 35.0 | −3.0 | 27.2 | |
| 221 | COE — AUTOMATIC SWITCHING* | — | 0.0 | — | — | |
| 221 | COE — A.M.R.E.* | — | 0.0 | — | — | |
| 221 | COE — AUTO SWITCHING — DIG | 12.7 | 2.0 | 7.1 | 7.2 | 1983 |
| 221 | COE — CIRCUIT | 7.3 | 5.0 | 17.8 | 10.6 | 1983 |
| 221 | COE — RADIO | 4.6 | 0.0 | 63.7 | 7.9 | 1983 |
| 231 | STA APP — TELEPHONE | — | — | — | 12.8 | |
| 231 | STA APP — TELETYPEWRITER | — | — | — | 7.6 | |
| 231 | STA APP — RADIOTELEPHONE | — | — | — | 0.0 | |
| 234 | LARGE PBX | — | — | — | 20.5 | |
| 235 | COIN TELEPHONE | — | — | — | 12.8 | |
| 241 | POLE LINES | 16.8 | −25.0 | 35.1 | 5.4 | 1983 |
| 242.1 | AERIAL CABLE | 16.4 | 5.0 | 42.9 | 3.2 | 1983 |
| 242.1 | AERIAL FIBER | 18.1 | −5.0 | 1.4 | 5.7 | 1984 |
| 242.2 | UNDERGROUND CABLE | 20.0 | −5.0 | 23.9 | 4.1 | 1983 |
| 242.2 | UNDERGROUND FIBER | 23.0 | −5.0 | 0.6 | 4.5 | 1984 |
| 242.3 | BURIED CABLE | 15.2 | 0.0 | 12.1 | 5.8 | 1983 |
| 242.3 | BURIED FIBER | 15.9 | −5.0 | 1.8 | 6.5 | 1984 |
| 243 | AERIAL WIRE | 5.3 | −65.0 | 12.5 | 28.8 | |
| 244 | UNDERGROUND CONDUIT | 46.0 | −1.0 | 21.5 | 1.7 | 1983 |
| 261 | FURNITURE | 9.3 | 20.0 | 10.3 | 7.5 | 1984 |
| 261 | OFFICE EQUIPMENT | 7.1 | 20.0 | 19.9 | 8.5 | 1984 |
| 261 | DATA PROCESSING EQPT | 5.0 | 0.0 | 7.0 | 18.6 | 1984 |
| 262 | OTHER COMMUNICATIONS EQPT | — | — | — | 14.4 | |
| 264 | MOTOR VEHICLES | 5.8 | 26.0 | 42.9 | 5.4 | 1984 |
| 264 | AIRCRAFT | 7.7 | 60.0 | 17.7 | 2.9 | 1984 |
| 264 | MOTOR VEHICLES SHOP EQPT | 6.6 | 2.0 | 29.7 | 10.3 | 1984 |
| 264 | TOOLS | 13.7 | 2.0 | 24.6 | 5.4 | 1984 |

* Amortization of January 1, 1986 monthly net book over five years.

## FEDERAL COMMUNICATIONS COMMISSION
### Schedule of Annual Percentages of Depreciation for
### GENERAL TELEPHONE COMPANY OF THE SOUTHEAST – TENNESSEE

Effective July 1, 1985

| *Account No.* A | *Class or Subclass of Plant* B | *Average Remaining Life (years)* C | *Future Net Salvage (%)* D | *12/31/84 Book Reserve (%)* E | *Remaining Life Rate (%)* F | *First Year ELG* G |
|---|---|---|---|---|---|---|
| 212 | BUILDINGS | 31.0 | 10.0 | 20.6 | 2.2 | 1984 |
| 221 | COE – SWITCHBOARD EQPT.* | — | 35.0 | — | — | |
| 221 | COE – AUTOMATIC SWITCHING | 8.4 | 0.0 | 25.8 | 8.8 | |
| 221 | COE – A.M.R.E. | 8.4 | -1.0 | -97.2 | 23.6 | |
| 221 | COE – AUTO SWITCHING – DIG. | 17.3 | 1.0 | 12.7 | 5.0 | 1983 |
| 221 | COE – CIRCUIT | 8.5 | 9.0 | 14.2 | 9.0 | 1983 |
| 221 | COE – RADIO | 7.5 | 1.0 | 34.8 | 8.6 | 1983 |
| 231 | STA APP – TELEPHONE | — | — | — | 12.5 | |
| 231 | STA APP – TELETYPEWRITER | — | — | — | 0.0 | |
| 231 | STA APP – RADIOTELEPHONE | — | — | — | 4.2 | |
| 234 | LARGE PBX | — | — | — | 14.5 | |
| 235 | COIN TELEPHONE | — | — | — | 12.5 | |
| 241 | POLE LINES | 15.6 | -27.0 | 18.8 | 6.9 | 1983 |
| 242.1 | AERIAL CABLE | 16.9 | -11.0 | 28.1 | 4.9 | 1983 |
| 242.2 | UNDERGROUND CABLE | 22.0 | -6.0 | 12.3 | 4.3 | 1983 |
| 242.3 | BURIED CABLE | 14.6 | -3.0 | 11.4 | 6.3 | 1983 |
| 243 | AERIAL WIRE | 4.3 | -55.0 | 2.4 | 35.5 | |
| 244 | UNDERGROUND CONDUIT | 48.0 | -1.0 | 23.3 | 1.6 | 1983 |
| 261 | FURNITURE | 11.0 | 10.0 | 25.6 | 5.9 | 1984 |
| 261 | OFFICE EQUIPMENT | 7.0 | 0.0 | 24.8 | 10.7 | 1984 |
| 261 | COMPUTERS | 5.6 | 0.0 | 7.9 | 16.4 | 1984 |
| 262 | OTHER COMMUNICATIONS EQPT | — | — | — | 12.2 | |
| 264 | MOTOR VEHICLES | 5.5 | 13.0 | 45.5 | 7.5 | 1984 |
| 264 | MOTOR VEHICLES SHOP EQPT | 7.4 | 3.0 | 13.3 | 11.3 | 1984 |
| 264 | TOOLS | 14.3 | 2.0 | 34.4 | 4.4 | 1984 |

* Amortization of January 1, 1985 monthly net book over three years.

## FEDERAL COMMUNICATIONS COMMISSION
### Schedule of Annual Percentages of Depreciation for HAWAIIAN TELEPHONE COMPANY

Effective December 1, 1985

| *Account No.* A | *Class or Subclass of Plant* B | *Average Remaining Life* (years) C | *Future Net Salvage (%)* D | *12/31/84 Book Reserve (%)* E | *Remaining Life Rate (%)* F | *First Year ELG* G |
|---|---|---|---|---|---|---|
| 212 | BUILDINGS | 34.0 | −3.0 | 25.1 | 2.3 | 1984 |
| 221 | MANUAL SWITCHING EQUIPMENT | 4.8 | −5.0 | 23.8 | 16.9 | |
| 221 | AUTO SW EQPT — NO. 1 & 2 EAX | 9.4 | −5.0 | 22.8 | 8.7 | 1983 |
| 221 | AUTO SW EQPT — DIGITAL | 13.1 | 0.0 | 12.1 | 6.7 | 1983 |
| 221 | AUTO SW EQPT — ALL OTHERS | 3.3 | −5.0 | 36.4 | 20.8 | |
| 221 | AUTO MESSAGE RECORDING EQPT | 2.3 | −1.0 | 11.4 | 39.0 | |
| 221 | COE — CIRCUIT EQUIPMENT | 9.4 | 9.0 | 22.7 | 7.3 | 1983 |
| 221 | COE — CIRCUIT EQUIPMENT — TP | 6.8 | −5.0 | 58.1 | 6.9 | 1983 |
| 221 | COE — RADIO | 9.9 | −5.0 | 37.8 | 6.8 | 1983 |
| 231 | STA APP — TELEPHONE | 5.8 | 5.0 | 17.3 | 13.4 | |
| 231 | STA APP — TELETYPEWRITER | 7.2 | 5.0 | 22.3 | 10.1 | |
| 234 | LARGE PBX — TELEPHONE | 5.7 | 3.0 | 24.5 | 12.7 | |
| 234 | LARGE PBX — SWT & SIG DEVICE | 7.0 | 5.0 | 61.0 | 4.9 | |
| 235 | PUBLIC TELEPHONE EQUIPMENT | — | — | — | 13.4 | |
| 241 | POLE LINES | 22.0 | −30.0 | 28.2 | 4.6 | 1983 |
| 242.1 | AERIAL CABLE | 21.0 | −15.0 | 28.2 | 4.1 | 1983 |
| 242.2 | UNDERGROUND CABLE | 29.0 | −18.0 | 18.3 | 3.4 | 1983 |
| 242.3 | BURIED CABLE | 24.0 | −10.0 | 41.2 | 2.9 | 1983 |
| 242.4 | SUBMARINE CABLE | 8.2 | −1.0 | 54.6 | 5.7 | 1983 |
| 243 | AERIAL WIRE | 7.8 | −35.0 | 35.0 | 12.8 | 1983 |
| 244 | UNDERGROUND CONDUIT | 42.0 | −15.0 | 20.5 | 2.3 | 1983 |
| 261 | FURNITURE & OFFICE EQPT | 14.1 | 10.0 | 27.0 | 4.5 | 1984 |
| 261 | COMPUTER DATA EQUIPMENT | 5.2 | 5.0 | 16.0 | 15.2 | 1984 |
| 264 | MOTOR VEHICLES | 4.7 | 18.0 | 48.6 | 7.1 | 1984 |
| 264 | MOTOR VEHICLES SHOP EQPT. | 9.1 | 0.0 | 57.0 | 4.7 | 1984 |
| 264 | TOOLS & OTHER WORK EQUIPMENT | 7.5 | 5.0 | 55.6 | 5.3 | 1984 |
| 264 | OTHER COMM EQUIPMENT | — | — | — | 11.4 | |

## FEDERAL COMMUNICATIONS COMMISSION
### Schedule of Annual Percentages of Depreciation for
### THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY - ARIZONA

**Effective December 31, 1985**

| *Account No.*<br>*A* | *Class or Subclass of Plant*<br>*B* | *Average Remaining Life (years)*<br>*C* | *Future Net Salvage (%)*<br>*D* | *12/31/84 Book Reserve (%)*<br>*E* | *Remaining Life Rate (%)*<br>*F* | *First Year ELG*<br>*G* |
|---|---|---|---|---|---|---|
| 212 | BUILDINGS | 24.0 | -4.0 | 17.5 | 3.6 | 1983 |
| 221 | COE — STEP-BY-STEP | 4.9 | -12.9 | 32.4 | 16.2 | |
| 221 | COE — CROSSBAR | 4.3 | -2.0 | 20.8 | 18.9 | |
| 221 | COE — CIRCUIT — OTHER | 8.6 | 4.0 | 18.7 | 9.0 | 1983 |
| 221 | COE — CIRCUIT — DDS | 6.4 | -4.0 | 24.5 | 12.4 | 1983 |
| 221 | COE — RADIO | 9.7 | 5.0 | 51.0 | 5.6 | 1983 |
| 221 | COE — ELECTRONIC | 13.2 | 4.0 | 11.5 | 6.4 | 1983 |
| 231 | STA APP — TELETYPEWRITER | — | — | — | 13.9 | |
| 231 | STA APP — TELE & MISC | — | — | — | 11.7 | |
| 231 | STA APP — RADIO | — | — | — | 6.4 | |
| 234 | LARGE PBX — ELECTRONIC | — | — | — | 14.1 | |
| 234 | LARGE PBX — OTHER | — | — | — | 34.1 | |
| 234 | LARGE PBX — DDS | — | — | — | 16.7 | |
| 235 | PUBLIC COMM EQUIPMENT | 3.3 | 4.0 | 40.5 | 16.8 | |
| 241 | POLE LINES | 17.3 | -34.0 | 51.8 | 4.8 | 1982 |
| 242.1 | AERIAL CABLE — EXCH — OTHER | 17.9 | -7.0 | 24.9 | 4.6 | 1982 |
| 242.1 | AERIAL CABLE — EXCH — BLDG | 15.5 | -15.0 | 62.9 | 3.4 | 1982 |
| 242.1 | AERIAL CABLE — TOLL | 10.8 | 13.0 | 1.4 | 7.9 | 1982 |
| 242.2 | UNDERGROUND CABLE — EXCH | 25.0 | 7.0 | 13.8 | 3.2 | 1982 |
| 242.2 | UNDERGROUND CABLE — TOLL | 15.4 | 21.0 | -9.9 | 5.8 | 1982 |
| 242.3 | BURIED CABLE — EXCHANGE | 22.0 | -3.0 | 17.7 | 3.9 | 1982 |
| 242.3 | BURIED CABLE — TOLL | 18.1 | 2.0 | 18.8 | 4.4 | 1982 |
| 242.4 | SUBMARINE CABLE — EXCHANGE | 22.0 | 0.0 | 38.5 | 2.8 | 1982 |
| 242.4 | SUBMARINE CABLE — TOLL | 23.0 | 0.0 | 70.4 | 1.3 | 1982 |
| 243 | AERIAL WIRE | 7.4 | -18.0 | -31.6 | 20.2 | |
| 244 | UNDERGROUND CONDUIT | 52.0 | -7.0 | 14.7 | 1.8 | 1982 |
| 261 | F&OE — FURNITURE & OFC EQPT | 12.5 | 2.0 | 12.5 | 6.8 | 1983 |
| 261 | F&OE — COMPUTER & AMA | 4.0 | 5.0 | 38.7 | 14.1 | 1983 |
| 262 | OCE — STATION APPARATUS | 5.2 | 0.0 | 35.1 | 12.5 | |
| 262 | OCE — PBX & KEY INTRASYS | 5.9 | 5.0 | 13.5 | 13.8 | |
| 264 | VOWE — MOTOR VEHICLES | 6.9 | 16.0 | 25.1 | 8.5 | 1983 |
| 264 | VOWE — OTHER WORK EQUIPMENT | 11.0 | 14.0 | 19.3 | 6.1 | 1983 |

## FEDERAL COMMUNICATIONS COMMISSION
### Schedule of Annual Percentages of Depreciation and Amortizations for
### THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY – COLORADO
### Effective August 1, 1985

| *Account No.* | *Class or Subclass of Plant* | *Average Remaining Life (years* | *Future Net Salvage (%)* | *12/31/84 Book Reserve* (%)* | *Remaining Life Rate (%)* | *Annual Amort. Expense# ($000)* | *First Year ELG* |
|---|---|---|---|---|---|---|---|
| *A* | *B* | *C* | *D* | *E* | *F* | *G* | *H* |
| 212 | BUILDINGS | 30.0 | – 2.0 | 20.7 | 2.7 | 851 | 1983 |
| 221 | COE – STEP-BY-STEP | 6.0 | – 8.0 | 44.4 | 10.6 | 1,013 | |
| 221 | COE – CROSSBAR | 3.8 | – 8.0 | 20.6 | 20.6 | | |
| 221 | COE – CIRCUIT –OTHER | 8.7 | 2.0 | 23.8 | 8.5 | 1,739 | 1983 |
| 221 | COE – CIRCUIT –DDS | 7.8 | – 4.0 | 13.6 | 11.6 | – 249 | 1983 |
| 221 | COE – RADIO | 11.2 | – 5.0 | 25.1 | 7.1 | – 160 | 1983 |
| 221 | COE – ELECTRONIC | 12.4 | 3.0 | 21.1 | 6.1 | 9,390 | 1983 |
| 231 | STA APP –TELETYPE-WRITER | – | – | – | 10.5 | | |
| 231 | STA APP – TELE & MISC | – | – | – | 11.5 | | |
| 231 | STA APP – RADIO | – | – | – | 10.6 | | |
| 234 | LARGE PBX – ELECTRONIC | – | – | – | 14.2 | | |
| 234 | LARGE PBX – OTHER | – | – | – | 22.8 | | |
| 234 | LARGE PBX – DDS | – | – | – | 16.6 | | |
| 235 | PUBLIC COMM EQUIPMENT | 5.1 | 2.0 | 50.0 | 9.4 | 407 | |
| 241 | POLE LINES | 13.7 | – 52.0 | 49.8 | 7.5 | 269 | 1982 |
| 242.1 | AERIALCABLE –EXCH – OTHER | 18.8 | – 16.0 | 34.2 | 4.4 | 1,330 | 1982 |
| 242.1 | AERIAL CABLE – EXCH – BLDG | 15.1 | – 14.0 | 24.6 | 5.9 | – 179 | 1982 |
| 242.1 | AERIAL CABLE –TOLL | 10.6 | 24.0 | 34.7 | 3.9 | 29 | 1982 |
| 242.2 | UNDERGROUND CABLE – EXCH | 21.0 | 22.0 | 19.5 | 2.8 | 2,935 | 1982 |
| 242.2 | UNDERGROUND CABLE – TOLL | 16.0 | 7.0 | 23.9 | 4.3 | 51 | 1982 |
| 242.3 | BURIED CABLE – EXCHANGE | 22.0 | 0.0 | 18.5 | 3.7 | 1,056 | 1982 |
| 242.3 | BURIED CABLE –TOLL | 17.1 | 11.0 | 27.7 | 3.6 | 234 | 1982 |
| 242.4 | SUBMARINE CABLE – EXCHANGE | 20.0 | 0.0 | 42.9 | 2.9 | – 1 | 1982 |
| 242.4 | SUBMARINE CABLE – TOLL | 22.0 | 0.0 | 12.0 | 4.0 | | 1982 |
| 243 | AERIAL WIRE | 5.9 | – 23.0 | 58.1 | 11.0 | 1,370 | |
| 244 | UNDERGROUND CONDUIT | 55.0 | – 7.0 | 12.7 | 1.7 | – 38 | 1982 |
| 261 | F&OE – FURNITURE & OFC EQPT | 11.8 | 2.0 | 17.0 | 6.9 | – 79 | 1983 |
| 261 | F&OE – COMPUTER & AMA | 4.3 | 2.0 | 36.5 | 14.3 | | 1983 |
| 262 | OCE – STATION APPARATUS | 6.9 | 0.0 | 36.2 | 9.2 | 341 | |
| 262 | OCE – PBX & KEY INTRASYS | 5.1 | 5.0 | 19.7 | 14.8 | – 6 | |
| 264 | VOWE – MOTOR VEHICLES | 4.4 | 14.0 | 40.5 | 10.3 | | 1983 |
| 264 | VOWE – OTHER WORK EQUIPMENT | 7.2 | 25.0 | 26.1 | 6.8 | 286 | 1983 |

* For accounts in which amortization expense figures are shown in Column (G), Column (E) contains the theoretical reserve percentage.

# Reflects amortization of the January 1, 1985 reserve imbalances over five years.

## FEDERAL COMMUNICATIONS COMMISSION

### Schedule of Annual Percentages of Depreciation for

### THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY — IDAHO

Effective October 1, 1985

| *Account No.* A | *Class or Subclass of Plant* B | *Average Remaining Life (years)* C | *Future Net Salvage (%)* D | *12/31/84 Book Reserve (%)* E | *Remaining Life Rate (%)* F | *First Year ELG* G |
|---|---|---|---|---|---|---|
| 212 | BUILDINGS | 28.0 | −1.0 | 20.5 | 2.9 | 1983 |
| 221 | COE — MANUAL* | — | — | — | — | |
| 221 | COE — STEP-BY-STEP | 5.1 | −7.0 | 25.4 | 16.0 | |
| 221 | COE — CROSSBAR | 3.2 | −7.0 | 39.3 | 21.2 | |
| 221 | COE — CIRCUIT — OTHER | 8.9 | 5.0 | 22.1 | 8.2 | 1983 |
| 221 | COE — CIRCUIT — DDS | 3.6 | −4.0 | 10.6 | 25.9 | 1983 |
| 221 | COE — RADIO | 9.0 | −9.0 | 50.4 | 6.5 | 1983 |
| 221 | COE — ELECTRONIC | 14.1 | 3.0 | 10.5 | 6.1 | 1983 |
| 231 | STA APP— TELETYPEWRITER | — | — | — | 15.5 | |
| 231 | STA APP— TELE & MISC | — | — | — | 11.1 | |
| 231 | STA APP - RADIO | — | — | — | 9.8 | |
| 234 | LARGE PBX — OTHER | — | — | — | 23.5 | |
| 234 | LARGE PBX — DDS | — | — | — | 17.8 | |
| 235 | PUBLIC COMM EQUIPMENT | 4.7 | 1.0 | 45.1 | 11.5 | |
| 241 | POLE LINES | 11.7 | −44.0 | 34.3 | 9.4 | 1982 |
| 242.1 | AERIAL CABLE — EXCH — OTHER | 17.0 | −12.0 | 18.9 | 5.5 | 1982 |
| 242.1 | AERIAL CABLE — EXCH — BLDG | 16.6 | −7.0 | 26.4 | 4.9 | 1982 |
| 242.1 | AERIAL CABLE — TOLL | 13.6 | 11.0 | −39.0 | 9.4 | 1982 |
| 242.2 | UNDERGROUND CABLE — EXCH | 22.0 | 3.0 | 12.4 | 3.8 | 1982 |
| 242.2 | UNDERGROUND CABLE — TOLL | 17.2 | −6.0 | 12.4 | 5.4 | 1982 |
| 242.3 | BURIED CABLE — EXCHANGE | 21.0 | −2.0 | 17.3 | 4.0 | 1982 |
| 242.3 | BURIED CABLE — TOLL | 15.3 | −2.0 | 28.4 | 4.8 | 1982 |
| 242.4 | SUBMARINE CABLE — EXCHANGE | 25.0 | 0.0 | 35.5 | 2.6 | 1982 |
| 242.4 | SUBMARINE CABLE — TOLL | 16.5 | 0.0 | 6.0 | 5.7 | 1982 |
| 243 | AERIAL WIRE # | 4.9 | −20.0 | 62.4 | 11.8 | |
| 244 | UNDERGROUND CONDUIT | 55.0 | −7.0 | 14.8 | 1.7 | 1982 |
| 261 | F&OE — FURNITURE & OFC EQPT | 12.4 | 3.0 | 20.2 | 6.2 | 1983 |
| 261 | F&OE — COMPUTER & AMA | 3.0 | 2.0 | 73.5 | 8.2 | 1983 |
| 262 | OCE — STATION APPARATUS | 4.6 | −1.0 | 30.6 | 15.3 | |
| 262 | OCE — PBX & KEY SYSTEMS | 4.5 | 5.0 | 31.8 | 14.0 | |
| 264 | VOWE — MOTOR VEHICLES | 6.3 | 8.0 | 24.3 | 10.7 | 1983 |
| 264 | VOWE — OTHER WORK EQUIPMENT | 9.6 | 8.0 | 38.5 | 5.6 | 1983 |

* Amortization of January 1, 1985 shortfall: $192,000 per year for two years.

# Amortization of January 1, 1985 reserve imbalance: $762,000 per year for three years. Reserve percent shown in Column (E) is theoretical reserve percent.

## FEDERAL COMMUNICATIONS COMMISSION
### Schedule of Annual Percentages of Depreciation for
### THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY – MONTANA

Effective December 31, 1985

| *Account No.* A | *Class or Subclass of Plant* B | *Average Remaining Life (years)* C | *Future Net Salvage (%)* D | *12/31/84 Book Reserve (%)* E | *Remaining Life Rate (%)* F | *First Year ELG* G |
|---|---|---|---|---|---|---|
| 212 | BUILDINGS | 23.0 | -2.0 | 21.7 | 3.5 | 1983 |
| 221 | COE — STEP-BY-STEP | 6.0 | -7.0 | 36.2 | 11.8 | |
| 221 | COE — CROSSBAR | 4.4 | -10.0 | 34.4 | 17.2 | |
| 221 | COE — CIRCUIT — OTHER | 9.3 | 2.0 | 25.2 | 7.8 | 1983 |
| 221 | COE — CIRCUIT — DDS | 11.0 | -4.0 | 0.0 | 9.5 | |
| 221 | COE — RADIO | 10.2 | -10.0 | 37.1 | 7.1 | 1983 |
| 221 | COE — ELECTRONIC | 13.2 | 3.0 | 1.7 | 7.2 | 1983 |
| 231 | STA APP — TELETYPEWRITER | — | — | — | 16.1 | |
| 231 | STA APP — TELE & MISC | — | — | — | 10.1 | |
| 231 | STA APP — RADIO | — | — | — | 13.6 | |
| 234 | LARGE PBX — ELECTRONIC | — | — | — | 14.1 | |
| 234 | LARGE PBX — OTHER | — | — | — | 20.8 | |
| 234 | LARGE PBX — DDS | — | — | — | 17.8 | |
| 235 | PUBLIC COMM EQUIPMENT | 4.6 | 1.0 | 32.1 | 14.5 | |
| 241 | POLE LINES | 6.5 | -51.0 | 11.1 | 21.5 | 1982 |
| 242.1 | AERIAL CABLE — EXCH — OTHER | 21.0 | -7.0 | 22.4 | 4.0 | 1982 |
| 242.1 | AERIAL CABLE — EXCH — BLDG | 13.2 | -2.0 | 24.1 | 5.9 | 1982 |
| 242.1 | AERIAL CABLE — TOLL | 13.4 | 8.0 | 22.3 | 5.2 | 1982 |
| 242.2 | UNDERGROUND CABLE — EXCH | 20.0 | 11.0 | 18.0 | 3.6 | 1982 |
| 242.2 | UNDERGROUND CABLE — TOLL | 15.9 | -5.0 | 13.9 | 5.7 | 1982 |
| 242.3 | BURIED CABLE — EXCHANGE | 19.6 | 7.0 | 11.9 | 4.1 | 1982 |
| 242.3 | BURIED CABLE — TOLL | 18.1 | 20.0 | 15.4 | 3.6 | 1982 |
| 242.4 | SUBMARINE CABLE — EXCHANGE | 22.0 | 0.0 | 50.8 | 2.2 | 1982 |
| 242.4 | SUBMARINE CABLE — TOLL | 18.4 | 0.0 | 52.2 | 2.6 | 1982 |
| 243 | AERIAL WIRE * | 5.9 | -43.0 | 79.2 | 10.8 | |
| 244 | UNDERGROUND CONDUIT | 50.0 | -7.0 | 19.3 | 1.8 | 1982 |
| 261 | F&OE — FURNITURE & OFC EQPT | 11.8 | 1.0 | 26.8 | 6.1 | 1983 |
| 261 | F&OE — COMPUTER & AMA | 4.3 | 2.0 | 0.3 | 22.7 | 1983 |
| 262 | OCE — STATION APPARATUS | 3.3 | -2.0 | 31.0 | 21.5 | |
| 262 | OCE — PBX & KEY INTRASYS | 4.1 | 5.0 | 29.3 | 16.0 | |
| 264 | VOWE — MOTOR VEHICLES | 5.8 | 20.0 | 38.4 | 7.2 | 1983 |
| 264 | VOWE — OTHER WORK EQUIPMENT | 11.7 | 18.0 | 28.7 | 4.6 | 1983 |

* Amortization of January 1, 1985 reserve imbalance: $1,763,000 per year for three years. Reserve percent shown in Column (E) is theoretical reserve percent.

## FEDERAL COMMUNICATIONS COMMISSION
### Schedule of Annual Percentages of Depreciation for
### THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY — NEW MEXICO

Effective June 15, 1985

| *Account No.* A | *Class or Subclass of Plant* B | *Average Remaining Life (years)* C | *Future Net Salvage (%)* D | *12/31/84 Book Reserve (%)* E | *Remaining Life Rate (%)* F | *First Year ELG* G |
|---|---|---|---|---|---|---|
| 212 | BUILDINGS | 30.0 | −2.0 | 13.6 | 2.9 | 1983 |
| 221 | COE — MANUAL* | — | | | | |
| 221 | COE — STEP-BY-STEP | 5.4 | −12.0 | 28.8 | 15.4 | |
| 221 | COE — CROSSBAR | 4.3 | −10.0 | 40.5 | 16.2 | |
| 221 | COE — CIRCUIT — OTHER | 7.8 | 3.0 | 18.6 | 10.1 | 1983 |
| 221 | COE — CIRCUIT DDS | 6.6 | −4.0 | 47.8 | 8.5 | 1983 |
| 221 | COE — RADIO | 9.6 | −16.0 | 36.6 | 8.3 | 1983 |
| 221 | COE — ELECTRONIC | 13.4 | 3.0 | 9.6 | 6.5 | 1983 |
| 231 | STA APP — TELETYPEWRITER | — | — | | 15.7 | |
| 231 | STA APP — TELE & MISC | — | — | — | 11.3 | |
| 231 | STA APP — RADIO | — | — | — | 5.5 | |
| 234 | LARGE PBX — ELECTRONIC | — | — | — | 11.9 | |
| 234 | LARGE PBX — OTHER | — | — | — | 19.9 | |
| 234 | LARGE PBX — DDS | — | — | — | 17.3 | |
| 235 | PUBLIC COMM EQUIPMENT | 3.1 | 2.0 | 24.7 | 23.6 | |
| 241 | POLE LINES | 13.1 | −29.0 | 48.1 | 6.2 | 1982 |
| 242.1 | AERIAL CABLE — EXCH — OTHER | 17.6 | −13.0 | 26.6 | 4.9 | 1982 |
| 242.1 | AERIAL CABLE — EXCH — BLDG | 15.7 | −15.0 | 16.7 | 6.3 | 1982 |
| 242.1 | AERIAL CABLE — TOLL | 10.6 | 13.0 | −8.5 | 9.0 | 1982 |
| 242.2 | UNDERGROUND CABLE — EXCH | 20.0 | 1.0 | 11.7 | 4.4 | 1982 |
| 242.2 | UNDERGROUND CABLE — TOLL | 15.5 | 2.0 | 8.4 | 5.8 | 1982 |
| 242.3 | BURIED CABLE EXCHANGE | 22.0 | −4.0 | 16.9 | 4.0 | 1982 |
| 242.3 | BURIED CABLE — TOLL | 17.7 | 0.0 | 20.0 | 4.5 | 1982 |
| 242.4 | SUBMARINE CABLE — EXCHANGE | 30.0 | 0.0 | 0.0 | 3.3 | 1982 |
| 242.4 | SUBMARINE CABLE — TOLL | 25.0 | 0.0 | 103.7 | 0.0 | 1982 |
| 243 | AERIAL WIRE # | 8.4 | −38.0 | 21.2 | 13.9 | |
| 244 | UNDERGROUND CONDUIT | 48.0 | 7.0 | 15.0 | 1.9 | 1982 |
| 261 | F&OE — FURNITURE & OFC EQPT | 11.2 | 1.0 | 9.2 | 8.0 | 1983 |
| 261 | F&OE — COMPUTER & AMA | 5.0 | 2.0 | 14.8 | 16.6 | 1983 |
| 262 | OCE — STATION APPARATUS | 3.1 | −2.0 | 32.1 | 22.5 | |
| 262 | OCE — PBX & KEY INTRASYS | 5.7 | 5.0 | 25.4 | 12.2 | |
| 264 | VOWE — MOTOR VEHICLES | 6.6 | 14.0 | 24.4 | 9.3 | 1983 |
| 264 | VOWE — OTHER WORK EQUIPMENT | 9.7 | 16.0 | 25.3 | 6.1 | 1983 |

* Amortization of January 1, 1985 shortfall: $348,000 per year for two years.

# Amortization of January 1, 1985 reserve imbalance: $936,000 per year for two years. Reserve percent shown in Column (E) is theoretical reserve percent.

## FEDERAL COMMUNICATIONS COMMISSION
## Schedule of Annual Percentages of Depreciation and Amortizations for THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY – UTAH

Effective December 31, 1985

| *Account No.* | *Class or Subclass of Plant* | *Average Remaining Life (years)* | *Future Net Salvage (%)* | *12/31/84 Book Reserve* (%)* | *Remaining Life Rate (%)* | *Annual Amort. Expense# ($000)* | *First Year ELG* |
|---|---|---|---|---|---|---|---|
| *A* | *B* | *C* | *D* | *E* | *F* | *G* | *H* |
| 212 | BUILDINGS | 35.0 | –2.0 | 16.2 | 2.5 | 588 | 1983 |
| 221 | COE – STEP-BY-STEP | 3.5 | –7.0 | 43.8 | 18.1 | | |
| 221 | COE – CROSSBAR | 2.4 | –3.0 | 21.8 | 33.8 | | |
| 221 | COE – CIRCUIT – OTHER | 8.4 | –2.0 | 26.7 | 9.0 | 2,942 | 1983 |
| 221 | COE – CIRCUIT – DDS | 7.1 | –4.0 | 15.7 | 12.4 | –27 | 1983 |
| 221 | COE – RADIO | 9.7 | –5.0 | 35.2 | 7.2 | –168 | 1983 |
| 221 | COE – ELECTRONIC | 11.1 | 3.0 | 17.6 | 7.2 | 2,714 | 1983 |
| 231 | STA APP – TELETYPEWRITER | – | – | – | 20.5 | | |
| 231 | STA APP – TELE & MISC | – | – | – | 12.1 | | |
| 231 | STA APP – RADIO | – | – | – | 12.7 | | |
| 234 | LARGE PBX – ELECTRONIC | – | – | – | 12.7 | | |
| 234 | LARGE PBX – OTHER | – | – | – | 48.7 | | |
| 234 | LARGE PBX – DDS | – | – | – | 15.8 | | |
| 235 | PUBLIC COMM EQUIPMENT | 4.5 | 2.0 | 45.5 | 11.7 | | |
| 241 | POLE LINES | 19.7 | –46.0 | 32.1 | 5.8 | –334 | 1982 |
| 242.1 | AERIAL CABLE – EXCH – OTHER | 17.8 | –9.0 | 32.6 | 4.3 | 376 | 1982 |
| 242.1 | AERIAL CABLE – EXCH – BLDG | 14.5 | –15.0 | 27.9 | 6.0 | 132 | 1982 |
| 242.1 | AERIAL CABLE – TOLL | 9.8 | 48.0 | 16.1 | 3.7 | 7 | 1982 |
| 242.2 | UNDERGROUND CABLE – EXCH | 20.0 | 17.0 | 25.8 | 2.9 | 1,337 | 1982 |
| 242.2 | UNDERGROUND CABLE – TOLL | 15.0 | 22.0 | 35.5 | 2.8 | 76 | 1982 |
| 242.3 | BURIED CABLE – EXCHANGE | 23.0 | –1.0 | 20.9 | 3.5 | 2,142 | 1982 |
| 243.3 | BURIED CABLE – TOLL | 17.2 | 2.0 | 28.2 | 4.1 | 6 | 1982 |
| 242.4 | SUBMARINE CABLE – EXCHANGE | 30.0 | 0.0 | 0.0 | 3.3 | | 1984 |
| 242.4 | SUBMARINE CABLE – TOLL | 30.0 | 0.0 | 0.0 | 3.3 | | 1984 |
| 243 | AERIAL WIRE | 7.5 | 1.0 | 40.6 | 7.8 | –1 | |
| 244 | UNDERGROUND CONDUIT | 48.0 | –7.0 | 19.9 | 1.8 | 143 | 1982 |
| 261 | F&OE – FURNITURE & OFC EQPT | 10.3 | 1.0 | 19.2 | 7.7 | 108 | 1983 |
| 261 | F&OE – COMPUTER & AMA | 4.4 | 2.0 | 35.5 | 14.2 | | 1983 |
| 262 | OCE – STATION APPARATUS | 3.0 | 1.0 | 57.9 | 13.7 | | |
| 262 | OCE – PBX & KEY INTRASYS | 4.6 | 5.0 | 53.9 | 8.9 | | |
| 264 | VOWE – MOTOR VEHICLES | 5.4 | 21.0 | 34.2 | 8.3 | –120 | 1983 |
| 264 | VOWE – OTHER WORK EQUIPMENT | 10.4 | 15.0 | 11.1 | 7.1 | –260 | 1983 |

* For accounts in which amortization expense figures are shown in Column (G), Column (E) contains the theoretical reserve percentage.

# Reflects amortization of the January 1, 1985 reserve imbalances over five years.

# FEDERAL COMMUNICATIONS COMMISSION
## Schedule of Annual Percentages of Depreciation for THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY — WYOMING

Effective November 1, 1985

| *Account No.* | *Class or Subclass of Plant* | *Average Remaining Life (years)* | *Future Net Salvage (%)* | *12/31/84 Book Reserve (%)* | *Remaining Life Rate (%)* | *First Year ELG* |
|---|---|---|---|---|---|---|
| *A* | *B* | *C* | *D* | *E* | *F* | *G* |
| 212 | BUILDINGS | 31.0 | −1.0 | 13.5 | 2.8 | 1983 |
| 221 | COE — MANUAL | * | — | — | — | — |
| 221 | COE — STEP-BY-STEP | 5.8 | −9.0 | 38.4 | 12.2 | |
| 221 | COE — CROSSBAR | 6.9 | −2.0 | 26.9 | 10.9 | |
| 221 | COE — CIRCUIT — OTHER | 8.7 | 3.0 | 14.6 | 9.5 | 1983 |
| 221 | COE — CIRCUIT — DDS | 11.0 | −4.0 | 0.0 | 9.5 | 1983 |
| 221 | COE — RADIO | 9.7 | −5.0 | 27.9 | 7.9 | 1983 |
| 221 | COE — ELECTRONIC | 13.2 | 3.0 | 4.5 | 7.0 | 1983 |
| 231 | STA APP — TELETYPEWRITER | — | — | — | 20.5 | |
| 231 | STA APP — TELE & MISC | — | — | — | 9.9 | |
| 231 | STA APP — RADIO | — | — | — | 16.9 | |
| 234 | LARGE PBX — ELECTRONIC | — | — | — | 12.1 | |
| 234 | LARGE PBX — OTHER | — | — | — | 22.0 | |
| 234 | LARGE PBX — DDS | — | — | — | 17.8 | |
| 235 | PUBLIC COMM EQUIPMENT | 3.5 | 3.0 | 32.1 | 18.5 | |
| 241 | POLE LINES | 8.2 | −50.0 | 49.6 | 12.2 | 1982 |
| 242.1 | AERIAL CABLE — EXCH — OTHER | 17.6 | −18.0 | 16.3 | 5.8 | 1982 |
| 242.1 | AERIAL CABLE — EXCH — BLDG | 14.3 | −7.0 | 22.9 | 5.9 | 1982 |
| 242.1 | AERIAL CABLE — TOLL | 11.1 | 6.0 | −48.3 | 12.8 | 1982 |
| 242.2 | UNDERGROUND CABLE — EXCH | 19.9 | 8.0 | 9.2 | 4.2 | 1982 |
| 242.2 | UNDERGROUND CABLE — TOLL | 15.9 | −6.0 | 1.4 | 6.6 | 1982 |
| 242.3 | BURIED CABLE — EXCHANGE | 24.0 | −3.0 | 15.7 | 3.6 | 1982 |
| 242.3 | BURIED CABLE — TOLL | 15.7 | 2.0 | 50.6 | 3.0 | 1982 |
| 242.4 | SUBMARINE CABLE — EXCHANGE | 21.0 | 0.0 | 43.9 | 2.7 | 1982 |
| 242.4 | SUBMARINE CABLE — TOLL | 30.0 | 2.0 | 0.0 | 3.3 | 1982 |
| 243 | AERIAL WIRE | # | 4.8 | −2.0 | 37.1 | 13.5 |
| 244 | UNDERGROUND CONDUIT | 57.0 | −7.0 | 10.5 | 1.7 | 1982 |
| 261 | F&OE — FURNITURE & OFC EQPT | 12.9 | 2.0 | 17.8 | 6.2 | 1983 |
| 261 | F&OE — COMPUTER & AMA | 4.5 | 2.0 | 21.6 | 17.0 | 1983 |
| 262 | OCE — STATION APPARATUS | 3.8 | −1.0 | 34.1 | 17.6 | |
| 262 | OCE — PBX & KEY INTRASYS | 5.1 | 5.0 | 11.1 | 16.5 | |
| 264 | VOWE — MOTOR VEHICLES | 5.8 | 10.0 | 32.1 | 10.0 | 1983 |
| 264 | VOWE — OTHER WORK EQUIPMENT | 11.3 | 21.0 | 16.9 | 5.5 | 1983 |

* Amortization of January 1, 1985 shortfall: $718,000 per year for two years.

# Amortization of January 1, 1985 reserve imbalance: $720,000 per year for three years. Reserve percent shown in Column (E) is theoretical reserve percent.

## FEDERAL COMMUNICATIONS COMMISSION
## Schedule of Annual Percentages of Depreciation for
## NEVADA BELL

Effective Janaury 1, 1985

| *Account No.* | *Class or Subclass of Plant* | *Average Remaining Life (years)* | *Future Net Salvage (%)* | *12/31/84 Book Reserve (%)* | *Remaining Life Rate (%)* | *First Year ELG* |
|---|---|---|---|---|---|---|
| *A* | *B* | *C* | *D* | *E* | *F* | *G* |
| 212 | BUILDINGS | 29.0 | −2.0 | 21.3 | 2.8 | 1984 |
| 221 | COE — STEP - BY - STEP | 3.1 | −7.0 | 60.8 | 14.9 | |
| 221 | COE — CROSSBAR* | — | — | — | 7.8 | |
| 221 | COE — CIRCUIT — OTHER | 8.4 | 6.0 | 8.9 | 10.1 | 1983 |
| 221 | COE — CIRCUIT — DDS | 7.2 | −4.0 | 29.7 | 10.3 | 1983 |
| 221 | COE — RADIO | 6.5 | −5.0 | 38.1 | 10.3 | 1983 |
| 221 | COE — ELECTRONIC | 12.2 | 5.0 | 7.6 | 7.2 | 1983 |
| 231 | STA APP — TELETYPEWRITER | 8.5 | −2.0 | −29.4 | 15.5 | |
| 231 | STA APP — TELE & MISC | 7.2 | 0.0 | 76.7 | 3.2 | |
| 234 | LARGE PBX — OTHER | 3.1 | −4.0 | −6.0 | 35.5 | |
| 234 | LARGE PBX — DDS | 5.5 | 2.0 | 36.8 | 11.1 | |
| 235 | PUBLIC COMM EQUIPMENT | 5.9 | 0.0 | 19.2 | 13.7 | |
| 241 | POLE LINES | 24.0 | −75.0 | 47.1 | 5.3 | 1982 |
| 242.1 | AERIAL CABLE — EXCHANGE | 13.7 | −20.0 | 22.5 | 7.1 | 1982 |
| 242.1 | AERIAL CABLE — TOLL | 11.5 | −10.0 | 1.2 | 9.5 | 1982 |
| 242.2 | UNDERGROUND CABLE — EXCH | 15.8 | −6.0 | 13.8 | 5.8 | 1982 |
| 242.2 | UNDERGROUND CABLE — TOLL | 8.8 | −10.0 | 12.1 | 11.1 | 1982 |
| 242.3 | BURIED CABLE — EXCHANGE | 22.0 | −9.0 | 16.8 | 4.2 | 1982 |
| 242.3 | BURIED CABLE — TOLL | 14.8 | −2.0 | 32.7 | 4.7 | 1982 |
| 243 | AERIAL WIRE — EXCHANGE | 4.3 | −20.0 | 91.8 | 6.6 | |
| 243 | AERIAL WIRE— TOLL | 17.4 | −25.0 | 40.0 | 4.9 | |
| 244 | UNDERGROUND CONDUIT | 52.0 | −2.0 | 9.6 | 1.8 | 1982 |
| 261 | F&OE — FURNITURE | 12.1 | 7.0 | 22.1 | 5.9 | 1984 |
| 261 | F&OE — COMPUTER & AMA | 4.2 | 0.0 | 19.0 | 19.3 | 1984 |
| 262 | OTHER COMMUNICATIONS EQPT | 6.7 | 0.0 | 13.4 | 12.9 | |
| 264 | VEHICLES & OTHER WORK EQPT | 6.0 | 20.0 | 52.1 | 4.7 | 1984 |

* Crossbar — Other: continuation of amortization in FCC 83-607, released December 27, 1983: $4,865,000 per year for three years.

## FEDERAL COMMUNICATIONS COMMISSION
## Schedule of Annual Percentages of Depreciation for NEW JERSEY BELL TELEPHONE COMPANY

Effective May 1, 1985

| *Account No.*<br>*A* | *Class or Subclass of Plant*<br>*B* | *Average Remaining Life (years)*<br>*C* | *Future Net Salvage (%)*<br>*D* | *12/31/84 Book Reserve (%)*<br>*E* | *Remaining Life Rate (%)*<br>*F* | *First Year ELG*<br>*G* |
|---|---|---|---|---|---|---|
| 212 | BUILDINGS | 29.0 | 3.0 | 25.8 | 2.5 | 1983 |
| 221 | COE — MANUAL | 3.4 | −9.0 | 50.4 | 17.2 | |
| 221 | COE — STEP-BY-STEP | — | — | — | 24.8 | |
| 221 | COE — CROSSBAR* | — | — | — | 15.1 | |
| 221 | COE — CIRCUIT — OTHER | 9.4 | −1.0 | 21.6 | 8.4 | 1982 |
| 221 | COE — CIRCUIT — DDS | 5.4 | −2.0 | 25.0 | 14.3 | 1982 |
| 221 | COE — RADIO | 9.2 | 2.0 | 31.0 | 7.3 | 1982 |
| 221 | COE — ELECTRONIC | 12.3 | 1.0 | 12.5 | 7.0 | 1983 |
| 221 | COE — ELECTRONIC — DIGITAL | 12.3 | 1.0 | 4.8 | 7.7 | 1983 |
| 231 | STA APP — TELE & MISC | 3.4 | 3.0 | 24.2 | 21.4 | |
| 234 | LARGE PBX — OTHER | 3.8 | −3.0 | 41.6 | 16.2 | |
| 234 | LARGE PBX — DDS | 2.3 | −1.0 | 28.1 | 31.7 | |
| 235 | PUBLIC TELEPHONE | 7.1 | 3.0 | 31.3 | 9.3 | |
| 241 | POLE LINES | 25.0 | −66.0 | 43.7 | 4.9 | 1982 |
| 242.1 | AERIAL CABLE — SUBSCRIBER | 17.3 | −16.0 | 19.2 | 5.6 | 1982 |
| 242.1 | AERIAL CABLE — TRUNK | 14.8 | 41.0 | 23.6 | 2.4 | 1982 |
| 242.2 | UNDERGROUND CABLE — SUB | 24.0 | −4.0 | 16.2 | 3.7 | 1982 |
| 242.2 | UNDERGROUND CABLE — TRUNK | 19.8 | 12.0 | 23.1 | 3.3 | 1982 |
| 242.3 | BURIED CABLE | 21.0 | −4.0 | 15.6 | 4.2 | 1982 |
| 242.4 | SUBMARINE CABLE | 12.5 | −9.0 | 54.3 | 4.4 | 1982 |
| 243 | AERIAL WIRE | 7.4 | −84.0 | 56.1 | 17.3 | |
| 244 | UNDERGROUND CONDUIT | 47.0 | −5.0 | 17.4 | 1.9 | 1982 |
| 261 | F&OE — FURNITURE & OFC EQPT | 10.8 | 2.0 | 20.5 | 7.2 | 1983 |
| 261 | F&OE — COMPUTER & AMA | 4.2 | 7.0 | 42.4 | 12.0 | 1983 |
| 262 | OTHER COMMUNICATIONS EQPT | 5.5 | 3.0 | 34.5 | 11.4 | |
| 264 | VOWE — MOTOR VEHICLES | 5.3 | 17.0 | 46.8 | 6.8 | 1983 |
| 264 | VOWE — OTHER WORK EQUIPMENT | 6.9 | 0.0 | 38.1 | 9.0 | 1983 |

* Amortization of January 1, 1985 reserve shortfall: $2,425,000 per month for forty-four months.

## FEDERAL COMMUNICATIONS COMMISSION
### Schedule of Annual Percentages of Depreciation for
### PACIFIC BELL

Effective October 1, 1985

| *Account No.* *A* | *Class or Subclass of Plant* *B* | *Average Remaining Life (years)* *C* | *Future Net Salvage (%)* *D* | *12/31/84 Book Reserve (%)* *E* | *Remaining Life Rate (%)* *F* | *First Year ELG* *G* |
|---|---|---|---|---|---|---|
| 212 | BUILDINGS | 36.0 | 9.0 | 14.0 | 2.1 | 1984 |
| 221 | COE — STEP-BY-STEP* | — | — | — | — | |
| 221 | COE — CROSSBAR* | — | — | — | — | |
| 221 | COE — CIRCUIT — OTHER | 8.3 | 0.0 | 18.9 | 9.8 | 1983 |
| 221 | COE — CIRCUIT — DDS | 7.4 | -4.0 | 19.8 | 11.4 | 1983 |
| 221 | COE — RADIO | 10.0 | -8.0 | 20.0 | 8.8 | 1983 |
| 221 | COE — ELECTRONIC | 12.6 | 5.0 | 8.7 | 6.8 | 1983 |
| 231 | STA APP — TELETYPEWRITER | 4.7 | -3.0 | 166.2 | 0.0 | |
| 231 | STA APP — TELE & MISC | 5.8 | 5.0 | -46.3 | 24.4 | |
| 234 | LARGE PBX — OTHER | 3.5 | -3.0 | 26.6 | 21.8 | |
| 234 | LARGE PBX — DDS | 5.5 | 2.0 | 30.4 | 12.3 | |
| 235 | PUBLIC TELEPHONE EQUIPMENT | 6.0 | 5.0 | 47.8 | 7.9 | |
| 241 | POLE LINES | 21.0 | -75.0 | 38.3 | 6.5 | 1982 |
| 242.1 | AERIAL CABLE — EXCHANGE | 15.6 | -12.0 | 19.2 | 5.9 | 1982 |
| 242.1 | AERIAL CABLE — TOLL | 5.9 | -24.0 | 27.9 | 16.3 | 1982 |
| 242.2 | UNDERGROUND CABLE — EXCH | 19.6 | -6.0 | 14.1 | 4.7 | 1982 |
| 242.2 | UNDERGROUND CABLE — TOLL | 15.8 | 13.0 | 14.2 | 4.6 | 1982 |
| 242.3 | BURIED CABLE — EXCHANGE | 19.5 | -14.0 | 19.2 | 4.9 | 1982 |
| 242.3 | BURIED CABLE — TOLL | 15.5 | -6.0 | 29.0 | 5.0 | 1982 |
| 242.4 | SUBMARINE CABLE | 10.1 | -17.0 | 47.1 | 6.9 | 1982 |
| 243 | AERIAL WIRE — EXCHANGE | 5.5 | -5.0 | 56.2 | 8.9 | |
| 243 | AERIAL WIRE — TOLL | 3.0 | 33.0 | -34.3 | 33.8 | |
| 244 | UNDERGROUND CONDUIT | 53.0 | -20.0 | 13.2 | 2.0 | 1982 |
| 261 | F&OE — FURNITURE | 15.1 | 3.0 | 18.3 | 5.2 | 1984 |
| 261 | F&OE — COMPUTER & AMA | 4.3 | 5.0 | 18.7 | 17.7 | 1984 |
| 262 | OTHER COMMUNICATIONS EQPT | 5.3 | -1.0 | 36.1 | 12.2 | |
| 264 | VEHICLES & OTHER WORK EQPT | 7.9 | 13.0 | 31.0 | 7.1 | 1984 |

* Amortization of reserve shortfall as of January 1, 1986: $29,000 for Step-by-Step and $173,000 for Crossbar per year for three years. Amortization amounts for years five thru seven will be renegotiated during the next represcription.

## FEDERAL COMMUNICATIONS COMMISSION
### Schedule of Annual Percentages of Depreciation for
### PACIFIC NORTHWEST BELL TELEPHONE COMPANY — IDAHO

Effective January 1, 1986

| *Account No.* | *Class or Subclass of Plant* | *Average Remaining Life (years)* | *Future Net Salvage (%)* | *12/31/84 Book Reserve (%)* | *Remaining Life Rate (%)* | *First Year ELG* |
|---|---|---|---|---|---|---|
| *A* | *B* | *C* | *D* | *E* | *F* | *G* |
| 212 | BUILDINGS | 31.0 | 5.0 | 21.7 | 2.4 | 1983 |
| 221 | COE — STEP-BY-STEP | 3.5 | −2.0 | 35.8 | 18.9 | |
| 221 | COE — CROSSBAR | 3.4 | −3.0 | 51.8 | 15.1 | |
| 221 | COE — CIRCUIT — OTHER | 9.7 | −10.0 | 26.5 | 8.6 | 1983 |
| 221 | COE — CIRCUIT — DDS | 11.0 | −4.0 | 0.0 | 9.5 | |
| 221 | COE — RADIO | 10.1 | −12.0 | 17.6 | 9.3 | 1983 |
| 221 | COE — ELECTRONIC | 17.2 | −5.0 | 13.6 | 5.3 | 1983 |
| 231 | STA APP — TELE & MISC | — | — | — | 14.4 | |
| 234 | LARGE PBX — OTHER | — | — | — | 30.1 | |
| 235 | PUBLIC COMM EQUIPMENT | — | — | — | 14.4 | |
| 241 | POLE LINES | 7.3 | −28.0 | 24.9 | 14.1 | 1982 |
| 242.1 | AERIAL CABLE — EXCHANGE | 17.8 | −19.0 | 33.7 | 4.8 | 1982 |
| 242.1 | ERIAL CABLE — TOLL | 5.2 | −10.0 | −291.2 | 77.2 | 1982 |
| 242.2 | UNDERGROUND CABLE — EXCH | 31.0 | −7.0 | 15.2 | 3.0 | 1982 |
| 242.2 | UNDERGROUND CABLE — TOLL | 28.0 | 1.0 | −4.7 | 3.7 | 1982 |
| 242.3 | BURIED CABLE — EXCHANGE | 25.0 | −8.0 | 20.5 | 3.5 | 1982 |
| 242.3 | BURIED CABLE — TOLL | 25.0 | −9.0 | 27.9 | 3.2 | 1982 |
| 242.4 | SUBMARINE CABLE — EXCHANGE | 16.9 | −5.0 | 42.0 | 3.7 | 1982 |
| 242.4 | SUBMARINE CABLE — TOLL | 20.0 | −5.0 | 31.7 | 3.7 | 1982 |
| 243 | AERIAL WIRE — EXCHANGE | 5.6 | −47.0 | 44.3 | 18.3 | |
| 244 | UNDERGROUND CONDUIT | 52.0 | −15.0 | 15.9 | 1.9 | 1982 |
| 261 | F&OE — FURNITURE & OFC EQPT | 10.0 | 5.0 | 28.8 | 6.6 | 1983 |
| 261 | F&OE — COMPUTER & AMA | 4.3 | 9.0 | 0.0 | 21.2 | 1983 |
| 262 | OTHER COMMUNICATIONS EQPT | — | — | — | 14.2 | |
| 264 | VEHICLES & OTHER WORK EQPT | 5.8 | 20.0 | 74.4 | 1.0 | 1983 |

## FEDERAL COMMUNICATIONS COMMISSION
### Schedule of Annual Percentages of Depreciation and Amortizations for PACIFIC NORTHWEST BELL TELEPHONE COMPANY — OREGON

**Effective June 1, 1985**

| *Account No.* | *Class or Subclass of Plant* | *Average Remaining Life (years)* | *Future Net Salvage (%)* | *12/31/84 Book Reserve* (%)* | *Remaining Life Rate (%)* | *Annual Amort. Expense# ($000)* | *First Year ELG* |
|---|---|---|---|---|---|---|---|
| *A* | *B* | *C* | *D* | *E* | *F* | *G* | *H* |
| 212 | BUILDINGS | 30.0 | 1.0 | 20.1 | 2.6 | 371 | 1983 |
| 221 | COE — STEP-BY-STEP | 2.3 | -4.0 | 71.1 | 14.3 | 2,406 | |
| 221 | COE — CROSSBAR | 2.7 | -3.0 | 69.1 | 12.6 | 2,177 | |
| 221 | COE — CIRCUIT — OTHER | 8.8 | 6.0 | 24.6 | 7.9 | 3,898 | 1982 |
| 221 | COE — CIRCUIT — DDS | 8.1 | -4.0 | 29.8 | 9.2 | 7 | 1982 |
| 221 | COE — RADIO | 10.5 | -7.0 | 27.7 | 7.6 | 36 | 1982 |
| 221 | COE — ELECTRONIC | 12.0 | 5.0 | 22.9 | 6.0 | 6,540 | 1982 |
| 231 | STA APP — TELE & MISC | — | — | — | 13.7 | | |
| 234 | LARGE PBX — OTHER | — | — | — | 34.6 | | |
| 235 | PUBLIC COMM EQUIPMENT | — | — | — | 13.7 | | |
| 241 | POLE LINES | 14.3 | -35.0 | 39.3 | 6.7 | -439 | 1982 |
| 242.1 | AERIAL CABLE — EXCHANGE | 16.6 | -15.0 | 27.4 | 5.3 | 75 | 1982 |
| 242.1 | AERIAL CABLE — TOLL | 12.8 | 12.0 | 33.2 | 4.3 | -14 | 1982 |
| 242.2 | UNDERGROUND CABLE — EXCH | 28.0 | -13.0 | 23.4 | 3.2 | 1,203 | 1982 |
| 242.2 | UNDERGROUND CABLE — TOLL | 19.0 | 10.0 | 39.0 | 2.7 | 57 | 1982 |
| 242.3 | BURIED CABLE — EXCHANGE | 26.0 | -14.0 | 21.4 | 3.6 | -261 | 1982 |
| 242.3 | BURIED CABLE — TOLL | 17.4 | -4.0 | 61.1 | 2.5 | -56 | 1982 |
| 242.4 | SUBMARINE CABLE — EXCHANGE | 11.4 | -4.0 | 42.4 | 5.4 | 5 | 1982 |
| 242.4 | SUBMARINE CABLE — TOLL | 8.1 | -4.0 | 71.0 | 4.1 | 4 | 1982 |
| 243 | AERIAL WIRE — EXCHANGE | 6.3 | -34.0 | 57.1 | 12.2 | 110 | |
| 243 | AERIAL WIRE — TOLL | 5.0 | -12.0 | 90.0 | 4.4 | 17 | |
| 244 | UNDERGROUND CONDUIT | 49.0 | -15.0 | 18.7 | 2.0 | 555 | 1982 |
| 261 | F&OE — FURNITURE & OFC EQPT | 11.5 | 9.0 | 20.0 | 6.2 | 260 | 1983 |
| 261 | F&OE — COMPUTER & AMA | 3.2 | 10.0 | 24.0 | 20.6 | | 1983 |
| 262 | OTHER COMMUNICATIONS EQPT | — | — | — | 21.8 | | |
| 264 | VEHICLES & OTHER WORK EQPT | 5.4 | 21.0 | 39.0 | 7.4 | -690 | 1983 |

* For accounts in which amortization expense figures are shown in Column (G), Column (E) contains the theoretical reserve percentage.

# Reflects amortization of the January 1, 1985 reserve imbalances over 4.5 years for Step-by-Step & Crossbar and over 5 years for all other accounts. The effective date for these amortizations is January 1, 1985.

### FEDERAL COMMUNICATIONS COMMISSION
### Schedule of Annual Percentages of Depreciation for
### PACIFIC NORTHWEST BELL TELEPHONE COMPANY — WASHINGTON

Effective January 1, 1986

| *Account No.* | *Class or Subclass of Plant* | *Average Remaining Life (years)* | *Future Net Salvage (%)* | *12/31/84 Book Reserve (%)* | *Remaining Life Rate (%)* | *First Year ELG* |
|---|---|---|---|---|---|---|
| *A* | *B* | *C* | *D* | *E* | *F* | *G* |
| 212 | BUILDINGS | 33.0 | 4.0 | 15.0 | 2.5 | 1983 |
| 221 | MANUAL* | — | — | — | — | |
| 221 | COE — STEP-BY-STEP | 3.8 | −4.0 | 46.7 | 15.1 | |
| 221 | COE — CROSSBAR# | 1.6 | −3.0 | 78.2 | 15.5 | |
| 221 | COE — CIRCUIT — OTHER | 9.5 | 5.0 | 17.9 | 8.1 | 1983 |
| 221 | COE — CIRCUIT — DDS | 6.8 | −4.0 | 17.6 | 12.7 | 1983 |
| 221 | COE — RADIO | 9.9 | −10.0 | 24.1 | 8.7 | 1983 |
| 221 | COE — ELECTRONIC — ANALOG | 13.7 | 5.0 | 9.4 | 6.2 | 1983 |
| 221 | COE — ELECTRONIC — DIGITAL | 12.8 | 5.0 | 1.3 | 7.3 | 1983 |
| 231 | STA APP — TELE & MISC | — | — | — | 12.8 | |
| 234 | LARGE PBX — OTHER | — | — | — | 31.5 | |
| 235 | PUBLIC TELEPHONE | — | — | — | 12.8 | |
| 241 | POLE LINES | 17.3 | −58.0 | 28.8 | 7.5 | 1982 |
| 242.1 | AERIAL CABLE — EXCHANGE | 16.5 | −18.0 | 29.5 | 5.4 | 1982 |
| 242.1 | AERIAL CABLE — TOLL | 16.2 | 51.0 | 31.3 | 1.1 | 1982 |
| 242.2 | UNDERGROUND CABLE — EXCH | 26.0 | −14.0 | 16.4 | 3.8 | 1982 |
| 242.2 | UNDERGROUND CABLE — TOLL | 17.0 | 25.0 | 25.8 | 2.9 | 1982 |
| 242.3 | BURIED CABLE — EXCHANGE | 26.0 | −14.0 | 24.9 | 3.4 | 1982 |
| 242.3 | BURIED CABLE — TOLL | 18.4 | −3.0 | 51.0 | 2.8 | 1982 |
| 242.4 | SUBMARINE CABLE — EXCHANGE | 14.5 | −2.0 | 43.0 | 4.1 | 1982 |
| 242.4 | SUBMARINE CABLE — TOLL | 11.1 | −2.0 | 95.1 | 0.6 | 1982 |
| 243 | AERIAL WIRE — EXCHANGE | 4.3 | −56.0 | 52.8 | 24.0 | |
| 244 | UNDERGROUND CONDUIT | 50.0 | −10.0 | 14.9 | 1.9 | 1982 |
| 261 | F&OE — FURNITURE & OFC EQP | 9.2 | 5.0 | 23.7 | 7.8 | 1983 |
| 261 | F&OE — COMPUTER & AMA | 3.2 | 8.0 | 38.3 | 16.8 | 1983 |
| 262 | OTHER COMMUNICATIONS EQPT | — | — | — | 18.6 | |
| 264 | VEHICLES & OTHER WORK EQPT | 5.9 | 27.0 | 40.1 | 5.6 | 1983 |

* Amortization of January 1, 1985 shortfall: $447,000 per year for four years.

# Amortization of January 1, 1985 reserve imbalance: $9,176,000 per year for seven years. Reserve percent shown in Column (E) is theoretical reserve percent.

Character Qualifications, Effect of Misrepresentation
Disqualification, Character
Misrepresentation
Real Party in Interest

Review Board affirms ALJ's conclusion that applicant is not qualified to be a Commission licensee. An active principle in the applicant was guilty of misrepresentations to the Commission in another proceeding. There he represented to the Commission that he had ceased to be a principal of an applicant, but continued to be actively involved in its affairs. —*Bellingham TV Assn., Ltd.*
MM Docket No. 83-993

FCC 85R-105

## BEFORE THE

# FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

| | |
|---|---|
| In re Applications of | |
| BELLINGHAM TELEVISION ASSOCIATES, LTD. Bellingham, Washington | MM DOCKET NO. 83-993<br>File No. BPCT-820816KF |
| PRISM BROADCASTING CORPORATION Bellingham, Washington | MM DOCKET NO. 83-994<br>File No. BPCT-821109KF |
| For Construction Permit for a new Television Station | |

### *Appearances*

*Robert S. Stone* on behalf of Bellingham Television Associates, Ltd.; *Howard M. Liberman*, *Paul H. Friedman* and *Nora E. Garrote* on behalf of Prism Broadcasting Corporation; and *William H. Crispin* on behalf of Cascade Video of Oregon, Ltd.

## DECISION

Adopted: December 27, 1985; Released: January 10, 1986

BY THE REVIEW BOARD: MARINO (CHAIRMAN), JACOBS, AND BLUMENTHAL.

BOARD CHAIRMAN MARINO:

1. This is another television comparative case in which questions have been raised about the genuineness or candor of comparative pledges and proposals. See cases discussed in *Utah Television Associates, Ltd.*, FCC 85R-98, released December 10, 1985, at paras. 5-6. The trial type hearing in this case focused largely on the activities and representations of Forrest Preston, a principal in Bellingham Television Associates, Ltd., an applicant for a new UHF television station in Bellingham, Washington. In essence, Chief Administrative Law Judge Fitzpatrick, after making extensive findings of fact, disqualified Bellingham Associates because Preston misrepresented was lacking in candor about his role in another comparative proceeding to select the operator of a new VHF television station in Caldwell, Idaho. Initial Decision, FCC 85D-38, released June 6, 1985. The Review Board will affirm the Initial Decision's resolution of the candor issue for the reasons set out below.

2. *Background:* The hearing in this case was somewhat complex involving three different but possibly related comparative proceedings (Bellingham, Caldwell, and Portland, Oregon) and numerous issues. See I.D., Fdgs., paras. 1-9. However, the written briefs filed August 7 and 21, 1985, and oral argument held on November 22, 1985 (Tr. OA. pp. 1159, 1175-76, 1188), have helped narrow the dispositive issue here to whether Forrest Preston misrepresented or was lacking in candor about his role in the Caldwell application. For purposes of our Decision it is not necessary to reach the additional question of whether Preston engaged in similar conduct in the still ongoing Portland proceeding, *See Cascade Video of Oregon, Ltd.*, 99 FCC 2d 1001, 56 RR 2d 542 (Rev. Bd. 1984), *recon. den.*, FCC 84R-67, released September 21, 1984, and we have not taken any of that alleged misconduct into account here.

3. The relevant issues and findings can be found in the Initial Decision, and with two minor nondecisional corrections, para. 7 below, those findings are adopted by the Review Board. Preston, Philip B. Brooks, and Carl W. Campbell and all principals in the

Bellingham application. I.D., Fdgs., para. 24. The same three individuals, Preston, Brooks, and Campbell were also principals in the Caldwell application. *Id.*, at paras. 109, 113. The following issues had been designated in Caldwell and were subsequently incorporated into the Bellingham hearing when the Caldwell case was settled:

> To determine whether Forrest Preston has terminated his interest in Caldwell, and whether he is a real party in interest in Caldwell's application.
>
> To determine whether, in the July 5, 1983 amendment to the Caldwell application, Caldwell misrepresented facts or was lacking in candor concerning its ownership and its partners' intentions relating to that ownership. (*Id.*, para. 7)

4. Based upon full and specific findings of fact, (I.D., Fdgs., paras. 88-173) the Chief ALJ concluded that Preston had been guilty of deliberate and intentional misrepresentations. Preston's demeanor was found to be "that of an individual who was either unable or unwilling to acknowledge that he was the moving force and the real party in interest behind the [Caldwell] proposal. His characterization of the many functions he performed for [Caldwell] as minute (para. 131, *supra*) was a blatant misrepresentation." I.D., Concl., para. 14. Preston's purported withdrawal in July of 1983 as a partner in the Caldwell application "was not a *bona fide* transaction and the representation to this Commission that it was constituted deliberate misrepresentation." *Id.*, para. 15. The ALJ correctly noted that since FCC broadcast "regulation is premised on its ability to depend on the accuracy and truthfulness of licensees representations, ... disqualification is warranted when there is misrepresentations to this Commission by a principal of the applicant. *Country Broadcasting Company*, 93 FCC 2d 83, 53 RR 2nd 293 (Rev. Bd. 1983)." I.D., Concl., para. 16. Accordingly, he concluded that the Bellingham applicant was disqualified, or that "[a]t a minimum, a substantial and decisive comparative demerit" must be awarded which would also result in the denial of the Bellingham application, *Focus Television Co.*, 98 FCC 2d 546, 552-53, 56 RR 2d 1335, 1340 (Rev. Bd. 1984). *Id.*

5. *Discussion*: Bellingham's principal argument is that the ALJ unjustifiably credited all of the testimony of James E. Price, Vice-President of Sterling Communications, Inc., a consulting firm which assisted in the preparation of both the Bellingham and Caldwell applications. Bellingham claims that it established bias and prejudice on Price's part as the result of a disagreement

between Preston and Sterling. Conversely, it argues that the ALJ disbelieved all of its witnesses. (Br. 3, 15-16, 26). The Board does not agree that the ALJ relied solely on Price's testimony in making his findings of fact. Some reliance was placed on Price's testimony but the bulk of the findings, and most of the damaging points, rest upon contemporaneous documents prepared by Preston or his trusted assistant and secretary. This record made it impossible for the Chief ALJ to credit Preston's unreasonable tale.

6. Of course the trier of fact enjoys a superior opportunity to evaluate the witnesses' demeanor and judge their credibility, his determinations as to credibility are entitled to significant weight, and the Commission is generally reluctant to overturn those determinations unless his findings are patently in conflict with the record evidence. *See Country Broadcasting Company, supra,* 93 FCC 2d at 85 53 RR 2d at 297. *See also WHW Enterprises, Inc. v. F.C.C.*, 753 F. 2d 1132, 1141 (D.C. Cir. 1985). Nevertheless, we have cautioned against branding actual and potential broadcasters as "liars" without sensitive consideration of their explanations, especially in these contentious comparative cases. See cases cited in *Millard Orick, Jr.*, 89 FCC 2d 571 (Rev. Bd. 1982). Here the Board's own review of the record, in the light of the written and oral arguments, has established that the ALJ's judgment is supported not only by a preponderance of substantial evidence but also by the "higher-than-usual standard" of "clear, precise and indubitable evidence" or "clear and convincing evidence." Compare *Citizens for Jazz on WRVR, Inc.* v. *FCC*, No. 84-1431, (D.C. Cir. October 29, 1985), Scalia J., Slip Op. p. 6 and *Sea Island Broadcasting Co.*, v. *FCC*, 627 F.2d 240, 244 (D.C. Cir. 1980), Leventhal, J.

7. As accurately reflected in the I.D.'s findings the record establishes that Preston at all times was the moving force behind the Caldwell application, that Preston sought to conceal and mask that role in the Caldwell proceeding, and that his testimony and demeanor in the Bellingham hearing was fatally flawed. Bellingham does identify two instances of comparative findings based on material not admitted into evidence. These findings, a statement of I.D., Fdgs., para. 49, relying on Prism Exh. 23, p. 11, and a statement in I.D., Fdgs., para. 75, relying on Prism Exh. 26, are hereby stricken. However, Bellingham does not argue that the deletion of this material necessitates a different result on the misrepresentation issue. Rather, these instances are advanced as illustrative of "undue reliance on unreliable evidence." (Br. 22).

It points to no other findings which are not supported by the record, and our review has produced none. There is clear, substantial, and reliable evidence (most of it contemporaneous documents) in the record to support the findings and conclusions briefly summarized below, paras. 8-11.

8. Preston became interested through his involvement in Media Central in applying for the Caldwell television authorization. I.D., Fdgs., para. 91. Sterling, through its Media Central connections, was hired to prepare the Caldwell application, and it was Preston who interested Campbell, Brooks, and Adam (*the so-called* general partner) in becoming principals of the applicant. *Id.*, paras. 92-94, 97-99. Sterling's contacts with regard to the preparation of the application were with either Preston or the president of Media Central. *Id.*, para. 100. In November, 1981, Preston's secretary and assistant, opened an account for Caldwell with a bank in Cleveland, Tennessee, where Preston's office was located. Preston and his secretary were the signatories to the account. *Id.*, para. 102. All the checks drawn on the account until February, 1984, were signed by Preston's secretary. *Id.*, para. 125. It was also Preston who arranged for a commitment letter for the equipment to operate the station. *Id.*, paras. 105-6. When it became necessary to pay Sterling $1000, Preston had this amount transferred from the Bellingham account to the Caldwell account to cover the payment. *Id.*, para. 126. After the Caldwell application was filed in February, 1982, communications amongst Sterling, legal counsel, and the Caldwell applicant were almost entirely through Preston, who signed his correspondence as "Managing Partner." *Id.*, paras. 116-23.

9. Both Sterling and counsel advised that Preston's participation would hurt Caldwell's chances of obtaining a license. Caldwell then submitted the July 5, 1983 amendment reporting that Frey, an employee of Preston's, had been substituted for Preston as a partner. *Id.*, paras. 133-34, 136-37. The purported "transfer" was arranged during a five-minute telephone conversation between Preston and Frey on or about July 1, 1983. *Id.*, para. 138. During this conversation Preston did not inform Frey of the terms of the partnership agreement or what the interest would cost Frey, or indeed if it would cost anything. *Id.*, para. 139, 141. The Caldwell limited partnership agreement provided that any assignment of a limited partner's interest is null and void unless it is first offered in writing to the other limited partners. Preston did not comply with this provision. *Id.*, paras. 114, 134. Local state law provides that an assignee of a limited partnership does not become a

substituted limited partner until the Certificate of Limited Partnership is properly amended. An original certificate was never filed, *id.*, para. 115, and there is no indication that there was an attempt to correct this situation when Frey was "substituted." Moreover, Frey never signed the limited partnership agreement. *Id.*, para. 148. Nor was Frey given an estimate of what the partnership's costs in applying for a station might be. *Id.*, para. 144. Frey has neither contributed nor been asked to contribute funds and did not know what his financial obligations might be. *Id.*, para. 147. Nor was Frey informed when Caldwell entered into a settlement agreement and its application was dismissed. *Id.*, para. 149–52.

10. After Frey's purported substitution, in July of 1983, Preston continued to be the primary person involved in Caldwell's affairs. When a conflict arose with Sterling it was Preston, not Frey, who entered the fray with Sterling firing off two letters to Sterling and one to counsel (CP Exhs. 19, 20, and 29). These letters were on Caldwell's letterhead and either "Partner" or "Managing Partner" was typed under this signature. Preston also paid the balance due Sterling for its services. I.D., Fdgs., para. 156. Moreover, Preston continued as a signatory on Caldwell's bank account until February, 1984. *Id.*, para. 164. Also, in February, 1984, Preston paid $5,000 into Caldwell's account with his personal check; the money was used to pay Caldwell's legal fees. *Id.*, para. 167. Finally, in March, 1984, the events which precipitated Caldwell's entering into a settlement agreement were discussed primarily with Preston, and not Frey. *Id.*, para. 171–73.

11. Despite Bellingham's arguments to the contary, (Br. 10 and 26), the Board agrees with the ALJ that Preston was always in control of the Caldwell application. He originated the idea to form the partnership and file that application, he arranged for its preparation and financing, and he at all times conducted the partnership business, acting as managing partner and even signing correspondence under that title. The record also supports the more serious conclusion that Preston remained the controlling principal after his alleged replacement by Frey and that the reported removal of Preston from the Caldwell partnership was an attempt through fraud on the Commission to improve Caldwell's chances of securing that authorization. As the Chief ALJ suggested, the reasons for the misrepresentations are evident. First, the purported Caldwell general partner would receive full ownership participation credit if Preston was believed to be a limited partner. Second, the representation that Preston had timely

withdrawn in favor of Frey would eliminate any possible diversification demerit resulting from Preston's other media interests.

12. Bellingham's final argument, unsupported by any legal authority, is that the applicant should not be disqualified "for conduct allegedly engaged [in] by Preston alone." Br. 27-29. Preston's fraudulent and duplicitous behavior extended from the Caldwell proceeding into the Bellingham hearing, it was interrelated, contemporaneous, continuous, and struck at the heart of the reliability of the Commission's comparative process, calling for the severest of sanctions. See *Focus Television Co., supra*, 98 FCC 2d at 552-53, 56 RR 2d at 1340, and *RKO General, Inc. v. F.C.C.*, 670 F. 2d 215, 232 (D.C. Cir. 1981), *cert, denied*, 456 U.S. 927 (1982) which recognized that: "[T]he Commission must rely heavily on the completeness and accuracy of the submissions made to it, and its applicants in turn have an affirmative duty to inform the Commission of the facts it needs in order to fulfill its statutory mandate. The duty of candor is basic, and well known." Moreover, the Commission has recently emphasized that two "traits" are "crucial" in selecting broadcast applicants: "truthfulness and reliability." See FCC Report No. DC-318, December 10, 1985, Statement of Chairman Mark S. Fowler, *Character Policy Statement*.

13. In sum, we have affirmed the ALJ's disqualification of Bellingham Television Associates because of Preston's "deliberate", "intentional", and "blatant" misrepresentations, para. 4 above. We therefore do not reach any of the other issues, para. 2 above; nor need we consider the comparative demerit which would flow from Preston's misconduct. See *Country Broadcasting Company, supra*, 93 FCC 2d at 89, 53 RR 2d at 298. *But see Bay Television, Inc.*, 95 FCC 2d 181, 185 (Rev. Bd. 1983), *rev. denied* FCC 85-58, released March 25, 1985, appeal pending *sub nom. Home TV Incorporated* v. *FCC*, No. 85-1256, D.C. Cir. (Significant comparative sanction for failure to accurately report status of important principal).

14. ACCORDINGLY, IT IS ORDERED, That the Motions for Leave to Amend, filed on September 4, 1985, and November 19, 1985, by Bellingham Television Associates, Ltd., and the Petition for Leave to Amend, filed on October 23, 1985, by Prism Broadcasting Corporation, ARE GRANTED, and the respective amendments tendered therewith ARE ACCEPTED; and

15. IT IS FURTHER ORDERED, That the application of Bellingham Television Associates, Ltd., (File No. BPCT-820816KF) IS DENIED, and the application of Prism

Broadcasting Corporation (File No. BPCT-821109KF) IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION
JOSEPH A. MARINO, *Chairman, Review Board*

FCC 85D-38

BEFORE THE

# FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

| | |
|---|---|
| In re Applications of | |
| BELLINGHAM TELEVISION ASSOCIATES, LTD.<br>Bellingham, Washington | MM DOCKET NO. 83-933<br>File No. BPCT-820816KF |
| PRISM BROADCASTING CORPORATION<br>Bellingham, Washington | MM DOCKET NO. 83-994<br>File No. BPCT-821109KF |
| For Construction Permit for a New Television Station | |

## *Appearances*

*Robert S. Stone* on behalf of Bellingham Television Associates, Ltd.; *Howard M. Liberman, Paul H. Friedman* and *Nora E. Garrote* on behalf of Prism Broadcasting Corporation; and *William H. Crispin* and *William E. Kennard* on behalf of Cascade Video of Oregan, Ltd.

## INITIAL DECISION OF CHIEF ADMINISTRATIVE LAW JUDGE THOMAS B. FITZPATRICK

Issued: May 30, 1985; Released: June 6, 1985

## *Preliminary Statement*

1. This proceeding involves the mutually exclusive applications of Bellingham Television Associates, Ltd. (BTA) and Prism Broadcasting Corporation (Prism) for authority to construct a new commercial television broadcast station to operate on Channel 64 at Bellingham, Washington. In a *Hearing Designation Order*

(*HDO*), released September 30, 1983,[1] the Chief, Mass Media Bureau, acting pursuant to delegated authority, designated the applications for comparative hearing on the following issues:

> (1) To determine whether there is a reasonable possibility that the tower height and location proposed by Prism would constitute a hazard to air navigation.[2]
>
> (2) To determine, with respect to BTA, whether circumstances exist such that the public interest would be served by a waiver of Section 73.685(e) of the Commission's Rules.[3]
>
> (3) To determine which of the proposals would, on a comparative basis, better serve the public interest.
>
> (4) To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

2. Paragraph 8 of the *HDO* directed Prism to submit its explanation for answering "no" to Section II, Item 10, FCC Form 301. Prism submitted its explanation on October 13, 1983. Prism also submitted an amendment to its application on October 13, 1983. Prism's amendment and explanation established that Prism inadvertently checked the wrong box when it initially answered Section II, Item 10.

3. Paragraph 9 of the *HDO* directed BTA to submit a complete EEO proposal to the Presiding Judge. BTA filed its amendment and "Motion For Leave To Amend" on October 17, 1983, as supplemented by letter from counsel dated October 24, 1983 (furnishing an executed copy of the amendment). BTA's motion was granted and its amendment accepted by *Order* (FCC 83M-4423), released November 30, 1983.

4. By *Memorandum Opinion and Order* (FCC 84M-1128), released March 6, 1984, the Presiding Judge denied Prism's "Motion to Enlarge Issues," filed January 27, 1984, against BTA. However, the Presiding Judge directed that one of BTA's limited partners, Forrest Preston, appear as a witness and be available for examination by counsel for Prism. The Presiding Judge also directed that BTA's Partnership Agreement be made available to counsel for Prism and that Prism was entitled to inquire

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[1] The *HDO* was published in the Federal Register on October 6, 1983, 48 Fed. Reg. 45599.

[2] By *Order* (FCC 84M-331), released January 23, 1984, the Presiding Judge granted Prism's "Motion for Summary Decision" and resolved this issue in Prism's favor.

[3] By *Memorandum Opinion and Order* (FCC 84M-316), released January 20, 1984, the Presiding Judge granted BTA's "Motion for Summary Decision" and resolved this issue in favor of BTA.

concerning the authority exercised by BTA's general partner, Maxine Tuerk, as well as whether there were any agreements or understandings relative to the proposed operation of the BTA facility.

5. A prehearing conference was held on December 8, 1983.[4] Hearing sessions were held on March 20 and 21, 1984. The record was closed on March 21, 1984. Proposed Findings of Fact and Conclusions of Law and Replies were filed by Prism and BTA on May 25, 1984 and June 8, 1984, respectively.

6. On February 17, 1982, Caldwell Television Associates, Ltd. (CTA) filed an application for a construction permit for VHF television Channel 9, Caldwell, Idaho. In the application as originally filed, Forrest L. Preston (Preston) was listed as a 28 percent limited partner of the applicant. On July 5, 1983, two days before the B cut-off date for the CTA application, CTA filed an amendment which purported to remove Prestong as a limitd partner and replace him with William A. Frey, III (Frey). On February 10, 1984, TRC Communications, Inc. (TRC), a competing applicant in the Caldwell proceeding (MM Docket Nos. 82-746, *et al.*), filed a motion to enlarge issues against CTA, alleging that Preston had never terminated his interest in CTA and that he remained a real party in interest in CTA's application.

7. Administrative Law Judge Byron E. Harrison, the Presiding Judge in the Caldwell proceeding, by *Memorandum Opinion and Order* (FCC 84M-1191), released March 9, 1984, added the following issues against CTA:

> To determine whether Forrest Preston has terminated his interest in Caldwell, and whether he is a real party in interest in Caldwell's application.
>
> To determine whether, in the July 5, 1983 amendment to the Caldwell application, Caldwell misrepresented facts or was lacking in candor concerning its ownership and its partners' intentions relating to that ownership.

8. Subsequently, Caldwell and TRC reached a settlement agreement, and Caldwell's application was dismissed with prejudice on May 29, 1984. As a result, these two issues were never resolved in the Caldwell proceeding. Because Preston is also a limited partner in BTA, the Caldwell issues were added to this proceeding by

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[4] This was a scheduled on-the-record prehearing conference. However, due to a malfunctioning of the recording equipment used by the court reporter, it was not possible to develop the record of what transpired at the conference.

*Memorandum Opinion and Order* (FCC 84M-3349), released August 1, 1984.

9. In the same *Order* (FCC 84M-3349), the Presiding Judge also noted that issues had been added by the Review Board concerning another applicant in which Forrest Preston was involved, in a proceeding for authority to construct a new commercial television broadcast station at Portland Oregon (BC Docket Nos. 82-254, *et al.*) (*Memorandum Opinion and Order*, FCC 84R-49, released July 3, 1984).[5] The Board then remanded the Portland proceeding to Administrative Law Judge Joseph P. Gonzalez. On remand, Judge Gonzalez also added the Caldwell issues to the Portland proceeding. Pursuant to an agreement between the respective Presiding Judges and the parties, the parties in this proceeding will be bound by Judge Gonzalez' findings and conclusions on the Portland issues and the parties in the Portland proceeding will be bound by the findings and conclusions on the Caldwell issues adopted by the Presiding Judge in this proceeding (Tr. 317-22, 1115-17).

10. On October 12, 1984, Cascade Video of Oregon, Ltd. (Cascade), an applicant in the Portland, Oregon proceeding,[6] petitioned to intervene in this proceeding for the limited purpose of participating in the hearing regarding the Caldwell issues. By *Memorandum Opinion and Order* (FCC 84M-4757), released November 9, 1984, the Presiding Judge granted Cascade limited intervention. The further hearing on the Caldwell issues was held February 5-7, 1985 in Washington D. C.[7] The record was closed on February 7, 1985.

11. BTA, Prism and Cascade filed Supplemental Findings of Fact and Conclusions of Law on March 29, 1985.. BTA, Cascade

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[5] The Review Board enlarged the issues (hereinafter referred to as the Portland issues) against Portland Television Associates, Ltd. (PTA) to include the following:

> 1. To determine whether PTA has misrepresented facts and/or lacked candor regarding the genuineness and permanence of its integration proposal and the effect thereof on its basic or comparative qualifications.
>
> 2. To determine whether PTA has misrepresented facts, lacked candor, or violated Section 73.3514 of the Commission's Rules in failing to disclose plans to syndicate out its ownership or to have its proposed station professionally managed, and the effect thereof on its basic or comparative qualifications.

[6] Preston and Carl W. Campbell, principals in BTA, are also principals in PTA, an applicant in the Portland proceeding (BC Docket Nos. 82-254 and 82-256).

[7] A further hearing conference was held on September 18, 1984.

and Prism filed their Replies on April 12, 1985. On April 15, 1985, Cascade filed an Erratum and Prism filed a Corrected Reply.

## *Findings of Fact*

### *I. The Comparative Issue*

### *A. Prism Broadcasting Corporation*

#### *(1) The Applicant*

12. Prism Broadcasting Corporation (Prism) is a fictitious business name for Response Broadcasting Corporation (Response), a corporation organized under the laws of California (Prism Ex. 1, p. 1). Response is authorized to issue one million shares of common, voting stock. There are 180,930 shares issued and outstanding as follows (Prism Ex. 1):

| *Name* | *% Ownership* |
|---|---|
| Renette D. Anderson | 2.1 |
| Donald James Bohana | 4.2 |
| Peter Dauterive | 4.0 |
| Robert C. Davidson, Jr. | 2.7 |
| Lance Drummond | 5.0 |
| William L. Firestone | 2.1 |
| Michael Leonard Frisby | 2.7 |
| Robert Gay | 2.1 |
| Sidney Harman | 8.3 |
| Edward S. Hubbard | 2.5 |
| Channing D. Johnson[8] | 2.5 |
| Jeffalyn Johnson | 2.5 |
| Carolyn Jordon | 2.1 |
| Edward C. Maddox | 2.5 |
| Howard Miller | 8.3 |
| A. Palmer Reed | 0.7 |
| Lawrence Rogow | 3.9 |
| Ernest Shell | 2.7 |
| Ted Short | 3.2 |
| Garry Spire | 3.9 |
| The Carheart Corp.[9] | 8.3 |

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[8] Channing D. Johnson is the son of Jeffalyn Johnson.

[9] The principals of The Carheart Corp. (Carheart) and their holdings in Carheart are as follows:

| | |
|---|---|
| Carl A. Levinson | 23.4% |
| 1971 Trust for Donald Levinson | 23.4% |
| Trust for Helen Dorshow | 13.2% |
| Helen Dorshow | 10.2% |
| Anna Bessie Levinson | 18.4% |
| Trust for the Grandchildren of Anna Bessie Levinson | 11.4% |

| *Name* | *% Ownership* |
|---|---|
| Leon Valdry | 2.7 |
| Warren Valdry | 3.0 |
| Luis Villalobos | 4.8 |
| Frank G. Washington | 2.7 |
| Stanley A. Weiss | 8.3 |
| James Wood | 0.1 |
| Bill Zimmerman | 2.1 |
| Clifton Lee | .002 |
| Ola F. Tofforo | .009 |
| Ralph L. Williams | .003 |
| Charles Thomas | .002 |
| Charles L. James | .002 |
| Jimmy Rideau | .002 |

Ernest Shell, Norman Houston, Ted Short, Channing Johnson, Lance Drummond, Robert Davidson, Jr., William Firestone, Howard Miller and Frank Washington are directors of Response. Ernest Shell is Chairman of the Board and Lance Drummond is Vice-Chairman.[10] Norman Houston is the corporation's President and Chief Executive Officer. He receives 400 shares per month for services and has an option to purchase up to 2 percent of Response in each of 1984 and 1985 (Tr. 307). Ted Short is Treasurer and Chief Financial Officer and Channing Johnson is the corporation's Secretary (Prism Ex. 1, pp. 1, 2, 3). The present shareholders are being offered 15,000 of the remaining authorized shares at $5.00 a share in proportion to their present holdings[11] (Tr. 306).

### *(2) Diversification of Ownership of Mass Media*

13. As of March 1984, Response was the holder of the following construction permits for low power television (LPTV) stations (Prism Ex. 2):

Channel 49
Hermosa, Colorado

Channel 45
Durango, Colorado

---

[10] However, on February 27, 1985, Prism filed a "Petition For Leave To Amend" which reported that Shell recently died. By *Order* (FCC 85M-1208), released March 22, 1985, the Presiding Judge accepted the amendment.

[11] Should a given shareholder elect not to buy all shares offered to him, all other existing shareholders may acquire such rejected shares in proportion to their own ownership percentages until all are hopefully sold to existing shareholders (Tr. 306).

Channel 69
Bellingham, Washington

Channel 18
Bellingham, Washington

Channel 55
Aberdeen, Washington

Channel 27
Aberdeen, Washington

However, the Presiding Judge, by *Order* (FCC 85M-1763), released April 19, 1985, granted a "Petition For Leave To Amend," filed April 4, 1985 by Prism, and accepted the March 26, 1985 amendment which reported that Response holds permits for the following LPTV stations:

K45AM, Hermosa, Colorado

K49AV, Hermosa, Colorado

K18AP, Eastsound/Ferndale, Washington

K69DO, Eastsound/Ferndale, Washington

K27AL, Aberdeen, Washington

K55DX, Aberdeen, Washington

K56CB, Flagstaff, Arizona

K46AT, South Oroville, California

K35AJ, Barstow, California

K36AL, Paso Robles, California

K19AM, Paso Robles, California

This amendment also reported that Response has a number of LPTV applications pending before this Commission.

14. Lawrence Rogow (Rogow) and Garry Spire (Spire) are directors and Secretary and Treasurer, respectively, of The Mad River Broadcasting Company (Mad River), the permittee of television Station KREQ, Channel 23, Arcata, California.[12] They each own 25 percent of the voting stock (Prism Ex. 2, p. 2).

15. Rogow and Spire have an interest in Third Coast Broadcasting, Inc. (Third Coast). Third Coast was an applicant for a

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[12] Mad River has filed construction permit applications for LPTV stations on Channels 20, 41 and 47 at Rio Dell, California (March 26, 1985 Prism Amendment).

construction permit for Channel 61 at Houston, Texas.[13]

16. Ponyland Broadcasting Company (Ponyland), of which Rogow and Spire are managing partners and principals, has been granted construction permits for the following LPTV stations (March 26, 1985 Prism Amendment):

K52AR, Redding, California

K19AL, Jefferson City, Missouri

W24AA, Fort Myers, Florida

W21AD, Miami, Florida

Ponyland has been chosen the tentative selectee of a construction permit for an LPTV station on Channel 45 at Reno, Nevada, and has numerous applications for construction permits for LPTV stations pending before this Commission.

17. Baby Boom Broadcasting Company (Baby Boom), of which Rogow and Spire are general partners and principals, has a number of applications for construction permits for LPTV stations pending (March 26, 1985 Prism Amendment).

18. Rogow and Spire are principals in other entities which have applications pending for construction permits for new television stations on UHF television channels and also for FM channels and cellular radio facilities (March 26, 1985 Prism Amendment).

19. Robert Davidson, Jr. (Davidson) is a general partner in two limited partnerships known as Access I and Access II. Through these partnerships, he owns a 2 percent interest in Access, Inc., the owner and operator of the cable television franchise for the south central portion of the city of Los Angeles. Davidson's wife has a 10 percent interest in San Marco Broadcasting Company, an applicant for a Class B FM radio station on 106.7 MHz at Pasadena, California (Prism Ex. 2, p. 3).

20. Frank Washington (Washington) is Vice President for Electronic Communications at McClatchy Newspapers in Sacramento, California. Washington supervises the Director of the Broadcast Division. The Broadcast Division holds licenses to Stations KAER-FM and KEBK-AM in Sacramento and

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[13] Pursuant to a settlement agreement approved by the Presiding ALJ, the application of Third Coast in the Houston, Texas proceeding has been dismissed, and some of its principals, including Spire, now have an interest in Alliance Broadcasting Co., another applicant in that proceeding.

KMJ-AM and KNAX-FM in Fresno (Tr. 305).

21. Channing Johnson (Johnson) is a general partner in the limited partnerships known as Access I and Access II. Through these limited partnerships, Johnson has a 2 percent ownership interest in Access, Inc. Johnson is President and 60 percent owner of Johnson Broadcasting Corporation (Johnson Broadcasting). Johnson Broadcasting is the general partner and 20% owner of California Radio Partners, the licensee of Station KNTF-FM, Ontario, California. Johnson also has a 2.8 percent interest in and is Vice Chairman of the Board of Pasadena Media, Inc., the owner of three newspapers in Pasadena and Altadena, California (Prism Ex. 2, p. 3).

### *(3) Integration of Ownership and Management*

22. Prism does not propose to integrate any of its principals into the day-to-day management of the proposed television station.

### *(4) Auxiliary Power*

23. The Commission recently ruled that a preference is not to be awarded for proposing auxiliary power equipment in a television proceeding. *Minority Broadcasters of East St. Louis, Inc.* (FCC 85-131), released March 22, 1985.

## *B. Bellingham Television Associates, Ltd.*

### *(1) The Applicant*

24. Bellingham Television Associates, Ltd. (BTA) holds itself out to the public as a limited partnership organized under and subject to the provisions of the Limited Partnership Act of Washington State. The limited partnership agreement, dated July 21, 1982, was signed by Forrest L. Preston, Philip B. Brooks, Carl W. Campbell and Thomas H. Dye, the limited partners, and Maxine Tuerk, the general partner. Messrs. Preston and Dye reside in Cleveland, Tennessee. Messrs. Campbell and Brooks reside in Wenatchee, Washington, and Ms. Tuerk resides in Lynnwood, Washington. The agreement provides that Ms. Tuerk is the general partner. Each partner holds a 20 percent equity interest in BTA (Tr. 197; Prism Ex. 10, pp. 1-19). However, no certificate of limited partnership has ever been prepared or filed (Tr. 273).

25. The limited partnership agreement requires each partner to provide 20 percent of the initial capital of the partnership (Prism Ex. 10, pp. 4, 21). The partnership had spent approximately $18,000 as of March 21, 1984. Of that sum, Ms. Tuerk has contributed approximately $1,500 (Tr. 264). This represents less than 10 percent of the initial expenses of the partnership.

26. The limited partnership agreement prohibits the limited partners from participating in the management or control of the partnership's business or transacting any business for the partnership (Prism Ex. 10, p. 8, ¶ 13.1; p. 11, ¶ 15.1).

27. The limited partnership agreement provides that none of the limited partners has any liability to any of the partners or to the partnership's creditors except to the extent of their interest in the partnership (Prism Ex. 10, p. 8, ¶ 13.2). Ms. Tuerk was concerned that the four limited partners had limited liability and, as a result, talked with Campbell, who assured her that she would not be left holding all the responsibilities for the general partnership and that the limited partners would share in paying off losses and liabilities (Tr. 261, 277–78).

28. The limited partnership agreement vests exclusive authority to control the business affairs of the partnership in the general partner, Ms. Tuerk (Prism Ex. 10, p. 9, ¶ 14.2), and authorizes the general partner to execute and record a Certificate of Limited Partnership (Prism Ex. 10, pp. 14–15). As noted, *supra*, a certificate has not been filed (Tr. 273).

29. The principal office of the partnership is in Knoxville, Tennessee, at the office of its attorneys (Prism Ex. 10, p. 4). The partnership's bank account is located in Cleveland, Tennessee, where Preston resides and has his office (Tr. 99).

30. Preston at one time was authorized to sign checks on the partnership account, but he does not know whether he continues to have that authority. His secretary, Angela Clayton, and Maxine Tuerk are authorized to sign checks (Tr. 100). Ms. Tuerk has not written any checks on the partnership account (Tr. 283). Ms. Tuerk did not have possession of the partnership checkbook until shortly after the hearing (Tr. 105).

### *(2) Diversification of Ownership of Mass Media*

31. Neither BTA nor any of its partners, with the exception of Preston, has any ownership interest in any existing broadcast station, cable television system, newspaper, periodical, magazine, movie theater, advertising agency, broadcast station sales representative organization, multipoint distribution system, or any

other outlet of mass media communications. Preston is one of eight directors (he is not an officer) and is a 10.39 percent shareholder[14] of Media Central, Inc. (Media Central), a corporation holding an ownership interest in the following television broadcast stations (BTA Ex. 1, pp. 1-2; Prism Ex. 4):[15]

| *Station/Location* | *Ownership Percentage* | *Approximate Distance From Bellingham, Wash.* |
|---|---|---|
| WOAC-TV, Canton, Ohio | 22% (one of three general partners) | 2,085 miles |
| KHAI-TV, Honolulu, Hawaii[16] | 100% | 2,595 miles |
| KEKR-TV, Kansas City, Missouri | 60% | 1,500 miles |
| KBSI-TV, Cape Girardeau, Missouri | 60% | 1,800 miles |
| WTXT-TV, Huntsville, Alabama | 45%/10% option | 2,005 miles |

32. Media Central manages and operates the following stations, pursuant to management agreements (Prism Ex. 5, p. 5):[17]

| *Station* | *Location* |
|---|---|
| WKCH-TV | Knoxville, Tennessee |
| WXTX-TV | Columbus, Georgia |
| WBUO-TV | Appleton, Wisconsin |
| WUSB-TV | Schenectady, New York |
| WDBD-TV | Jackson, Mississippi |

33. Under its management contracts, Media Central provides the following services to the above-listed television stations: (a) programming; (b) sale of advertising; (c) promotion; (d) employment of personnel; (e) internal accounting, control and reporting; (f) billing and collection; (g) technical operation; (h) acquisition and maintenance of furniture, furnishings, equipment and supplies; (i) contracting for utilities; (j) insurance; and (k) compliance with FCC and other governmental regulations (Tr. 186; Prism Ex. 24, pp. 3-4).

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[14] By *Order* (FCC 84M-2795), released June 21, 1984, the Presiding Judge granted a "Motion For Leave To Amend," filed May 22, 1984 by BTA, and accepted an amendment reporting that Preston's equity interest was 10.39 percent and that 8.24 percent was a voting interest.

[15] Preston is a 25 percent general partner in PTA, the applicant for a new television station in Portland, Oregon (Tr. 11-12).

[16] Station KHAI-TV filed an application to change from Channel 20 to Channel 5 (Tr. 21).

[17] While Media Central does not have any ownership interest in any of these licensees, officers, directors and shareholders of Media Central, other than Preston, do have ownership interests in Stations WKCH-TV, WXTX-TV, WBUO-TV and WDBD-TV.

34. Pursuant to these management contracts, Media Central is authorized: to select and contract for programs and program materials; to recruit and hire station employees; to prepare the station's budget; to establish and supervise the accounting systems; and to establish bank accounts for the station (Tr. 187–90; Prism Ex. 24).

35. Under these management agreements, Media Central receives fees for its services (Tr. 191). The management contract for the Appleton station provides for Media Central to receive 7 percent of the net proceeds of any sale of the station during the life of the agreement or within six months thereafter. This payment accrues to Media Central independent of the service fee payments and regardless of whether the station retains Media Central to negotiate the sale. In addition, Media Central receives 5 percent of the net proceeds of any sale if it is retained as the agent. Preston did not know whether such a provision was typical of the other Media Central contracts with the other four "independent" stations, but he was of the view that the provision seemed reasonable (Tr. 193; Prism Ex. 24, p. 15, ¶ 4.3(a)).

36. Preston maintained that he was not active in the management of Media Central (Tr. 30, 37). He explained that specific projects of Media Central are not discussed during regular meetings of the Board of Directors[18] (Tr. 38, 79). Prior to the hearing, Preston had not seen a Media Central management contract (Tr. 186). According to Preston, the corporation is effectively run by Morton J. Kent, its President (Tr. 49).

### *(3) Integration of Ownership and Management*

37. Maxine Tuerk, the sole general partner, proposes to work at least 40 hours per week on a day-to-day basis as General Manager of the proposed station (BTA Ex. 2, p. 1). She proposes to hire the personnel necessary to operate the station, handle the funds, put together an office and operate and manage it and acquire equipment or bids for equipment, and make programming decisions (Tr. 297–98; BTA Ex. 2). As the general partner of BTA, it is proposed that she will be ultimately responsible for the

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[18] The Presiding Judge, by *Order* (FCC 85M-1874), released May 6, 1985, granted an amendment which reported that Preston had resigned as director of Media Central. However, it was ruled that, since this resignation could be construed as resulting in a comparative upgrading, it would be ignored in resolving this proceeding in order to assure that Prism was not in any way prejudiced.

establishment and maintenance of overall station policies, including programming decisions (BTA Ex. 2).

38. Ms. Tuerk, who has no prior broadcast experience, resides in Lynnwood, Washington, which is approximately 90 miles from Bellingham.[19] She presently intends to remain in Lynnwood and to commute daily to Bellingham in order to effectuate her integration proposal.[20] She has resided in Lynnwood since 1970. Prior to her residence there, she resided in Everett, Washington, from 1948 through 1953 and from 1959 through 1969 (BTA Ex. 2).

39. Ms. Tuerk is a real estate broker and business consultant, specializing in nursing homes and retirement centers (Tr. 291). She has been the sole proprietor of a real estate brokerage firm since 1968 which specializes in medically-oriented real estate properties. This work involves preparing feasibility studies and acting as consultant in this real estate field (Tr. 245). Business investments include real estate properties only, which require little management or time on her part. Should a conflict ever arise relative to her time commitments, Ms. Tuerk would give top priority to her commitment to serve as General Manager of the station proposed by BTA (BTA Ex. 2, p. 2).

40. Ms. Tuerk does not presently employ anyone in her real estate brokerage business. She does not intend to divest herself of the business if BTA receives a construction permit. Rather, she proposes to hire someone to work under her license (Tr. 291–92). However, Ms. Tuerk has not yet found or formalized an agreement with such an employee (Tr. 292). If she finds an experienced employee, she does not anticipate exercising more than nominal supervision (Tr. 295). Ms. Tuerk expects to be advised of sales in process and disposition of trust monies. She did not specify the amount of time she expected this to take. She also expects to work at the firm once a year during the annual audit (Tr. 294). She does not propose to hire a licensed broker. Rather, this new employee would work under her license (Tr. 292).

### *(4) Auxiliary Power*

41. As noted in paragraph 23, *supra*, this is not an area of comparative evaluation.

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[19] Lynnwood is not within the proposed Grade B contour (Tr. 246–47).

[20] Ms. Tuerk estimated that she can make the 90-mile commute in between one hour and one hour and fifteen minutes. The Presiding Judge noted that she would be violating the speed limit (Tr. 247).

### *(5) Relationship of BTA To Media Central and Sterling Communications, Inc.*

### *(a) Media Central and Consolidated Resources Corporation of America*

42. As noted, *supra*, Forrest Preston is a 10.39 percent shareholder and director of Media Central.[21] He is also a 25 percent shareholder and director of Consolidated Resources Corporation of America (CRCA) (Tr. 130-31). As detailed in paragraphs 31-36, *supra*, Media Central provides management, operational, consulting and programming services to five television licensees pursuant to management and operation agreements and provides similar services to five television stations in which it has a direct ownership interest (BTA Ex. 1, p. 2; Prism Ex. 5, p. 5). Under these contracts, Media Central performs all aspects of the day-to-day management and operation of the station (Prism Ex. 24, p. 3; Tr. 182, 183). Preston acknowledged that Media Central depends for its continued growth on its ability to obtain management contracts with additional stations (Tr. 208).

43. CRCA provides syndication services to limited partnerships in a number of areas, including television stations (Tr. 132). CRCA performs the function of selling limited partnership units to investors. The proceeds from this fund raising are used by the licensee, *inter alia*, to finance the station construction and operation (Tr. 138-39). CRCA performed syndication services for Station WOAC-TV, Canton, Ohio, through the syndication of Canton 67, Ltd., a limited partnership in which Media Central is a 22 percent general partner (Prism Ex. 23, pp. 2-3).

### *(b) Preston's Role Re BTA Application*

44. Preston, a BTA limited partner, resides in Cleveland, Tennessee (Tr. 10). He is the president of Life Care Centers of America, an enterprise that owns, operates and syndicates nursing homes and life care facilities (Prism Ex. 23, p. 11). Preston, a sophisticated investor, is a partner in approximately forty limited and general partnerships[22] (Tr. 40). Preston is well aware of the differences between a limited and a general partner (Tr. 45).

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[21] Morton Kent (Kent) is the majority shareholder, president and director of Media Central.

[22] For example, he is a 25 percent general partner in PTA, an applicant for a new television station in Portland, Oregon, and was a limited partner in CTA, a former applicant for a new television station at Caldwell, Idaho. He was also involved in an application for Sacramento, California (Prism Ex. 17).

45. Preston became interested in applying for a television station. He spoke with H. Bernard Dixon (Dixon), a Media Central director[23] (Tr. 50). Dixon suggested that Preston speak with Morton Kent[24] about the availability of Sterling Communications, Inc. (Sterling) to prepare a UHF application for Bellingham, Washington (Tr. 50).

46. Sterling is a communications consulting company providing consulting services to broadcast applicants. This includes preparation of the application, preparation of engineering exhibits and recommendations of broadcast attorneys (Tr. 42; Prism Ex. 9, pp. 1–3). Sterling is located in Chattanooga, Tennessee[25] (Prism Ex. 8).

47. Preston spoke with Kent, who directed him to Sterling. On June 26, 1981, James E. Price, Vice President of Sterling, at Kent's request, sent agreements to Preston relative to television applications for Salem, Oregon, Bellingham, Washington and Caldwell, Idaho. Sterling asked Preston to identify the individual Price was to contact regarding the "Community Survey, antenna location, etc." (Prism Ex. 14).

48. In early July 1981, Price sent to Preston "earnings potential analyses" relative to various television markets, including Bellingham, to assist Preston as he spoke to "prospective principals" (Prism Ex. 15; Tr. 110).

49. Preston spoke with Carl W. Campbell (Campbell) and interested him in the Bellingham application. Preston and Campbell are partners in a number of business transactions, including pending applications for two television stations in addition to BTA (Tr. 12, 18, 57). Campbell is Chairman of the Board of CRCA and of Life Care Centers of America (Prism Ex. 23, p. 11).

50. Sometime during the fall of 1981, Preston and Campbell asked Ms. Tuerk to meet them in Wenatchee, Washington at Campbell's office to discuss a business proposal (Tr. 248–49). They met and Preston asked whether Ms. Tuerk would be interested in applying for a television construction permit.[26] He

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[23] Dixon is also a partner or shareholder in three of the stations managed but not directly owned by Media Central.

[24] Kent is the majority shareholder of Media Central and was, in 1981, a Sterling director (Tr. 30).

[25] Preston was aware of at least ten applicants that Media Central has referred to Sterling (Tr. 77). Sterling paid a fee to Media Central for those referrals (Tr. 52).

[26] Ms. Tuerk's real estate brokerage business extends nationwide. She met Preston approximately seven years ago, as a result of their mutual business interest in nursing home and retirement centers (Tr. 244–45).

explained the broadcast business and the application procedure (Tr. 249). Preston informed her that Sterling would be able to assist with the application and prepare the engineering and that the law firm of McCampbell & Young could perform the legal services. Ms. Tuerk was interested (Tr. 249-50).

51. At this meeting, Preston, Campbell and Ms. Tuerk agreed to proceed with the application. They decided that they would form a general partnership to file the application. Campbell and Preston and Ms. Tuerk each agreed to be a 20 percent general partner at that meeting. At that time, there was a possibility that Thomas H. Dye and Philip B. Brooks would also join as 20 percent general partners[27] (Tr. 253-55).

52. Campbell, Preston and Ms. Tuerk decided at the meeting in the fall of 1981 to form a general partnership and for that general partnership to apply for the Bellingham construction permit (Tr. 62, 254).

53. Sometime following that meeting, but before the application was filed, Ms. Tuerk signed a general partnership agreement (Tr. 255). That agreement was also signed by Campbell and Dye (Prism Ex. 12, p. 2). It contained spaces for Preston and Brooks to sign. However, they did not execute the document, which is undated except for the year—1981. According to Preston, this was a proposal for the formation of the general partnership that would apply for the Bellingham construction permit (Tr. 98). Preston explained that the document, which was prepared by Sterling, was never executed, the general partnership was never formed, and he did not receive the document until approximately the spring of 1982, when the partners authorized Sterling to proceed with the preparation of the application (Tr. 99).

54. The general partnership agreement identified the principal office of the partnership as 3520 Keith Street, Cleveland, Tennessee (Prism Ex. 12). This is Preston's business address (Prism Ex. 16). The partnership books were to be maintained at the principal office. Checks were to be signed by Preston and Brooks. The partnership was to be managed by the partners, and individual partners were restricted from binding the partnership without the consent of the others (Prism Ex. 16, ¶¶ 4-6).

55. On December 29, 1981, Preston, by letter to Price, sent a deposit of $1,000 to Sterling for the Bellingham application.[28]

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[27] Brooks is also a partner in two other pending applications (Tr. 12, 18). Dye is an employee of Carl W. Campbell (Tr. 199).

[28] A $1,000 check was also sent for the Boise, Idaho application (Prism Ex. 16).

Preston, in this letter, identified Ms. Tuerk as the "local contact" (Prism Ex. 16).

56. The record is silent regarding what, if anything, occurred between Preston's payment of a deposit in December 1981 and May 1982. At some point, Preston and Kent discussed the "protocol" relative to the BTA application; namely, the procedure to be followed with respect to the BTA application. Kent advised Preston to follow the advice of legal and engineering counsel (Tr. 39). Also, Sterling recommended legal counsel to Preston (Tr. 43).

57. On May 6, 1982, Preston wrote to Price of Sterling regarding the BTA application (Prism Ex. 17). Preston requested a new consulting contract or a copy of the consulting contract Sterling had sent earlier.[29] Preston informed Price that the partnership was ready to proceed with the application (Prism Ex. 17).

58. On May 17, 1982, Preston sent Price the consulting agreement and a check in the amount of $11,500, the balance of the fees for the preparation of the application for Bellingham[30] (Prism Ex. 8). Preston acknowledged that the check came from his office and was drawn either on one of his accounts or on a partnership account. He was not certain whether or not a BTA partnership account had, at that time, been established (Tr. 63).

59. In his May 17, 1982 letter, Preston requested a detailed agenda regarding the Bellingham application "so that I will know the proper things that I should be doing to support your services" (Prism Ex. 8). None of the other partners was copied on Preston's letter.

### *(c) Preston's Execution of the BTA Consulting Agreement With Sterling*[31]

60. As noted, *supra*, Preston also enclosed the signed consulting agreement with Sterling for the Bellingham station in his May 17, 1982 letter (Prism Ex. 8; Tr. 88-89). This consulting agreement bears the caption: "CONSULTING AGREEMENT FOR MEDIA CENTRAL AFFILIATES" (Prism Ex. 9). It is an agreement between Sterling and BTA. Preston executed the agreement, on behalf of BTA, on May 17, 1982 (Tr. 89). Sterling

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[29] A contract had been provided by Sterling to Preston nearly a year earlier (Prism Ex. 14; Tr. 109).

[30] A portion of the $12,500 fee was paid to Media Central by Sterling as a referral fee (Tr. 53).

[31] Sterling's and Preston's roles in the preparation of the application for Caldwell, Idaho and other markets are discussed, *infra*, relative to the Caldwell issues.

executed the agreement under date of May 25, 1982. Sterling prepared the application that BTA is prosecuting in this proceeding pursuant to this agreement (Prism Ex. 9; Tr. 90).

61. Ms. Tuerk, BTA's general partner, was unaware of the existence of this consulting agreement with Sterling until early 1984[32] (Tr. 272-73). Ms. Tuerk knew that Preston was involved with Media Central but only became aware of Preston's ownership interest in Media Central when she executed amendments to the BTA application sometime after the application was filed with the Commission (Tr. 281-82). Ms. Tuerk is unaware of any other agreements between BTA and Sterling (Tr. 273).

62. Under this agreement, Sterling agreed to undertake all work necessary to prepare an application for BTA. This included site selection, preparation of technical exhibits, coordinating community surveys, and obtaining "all other financial, technical, programming, legal and other material" required for the application. Sterling also agreed to attend to all other matters arising prior to the "B" cut-off date for no fee in addition to the $12,500 (Prism Ex. 9, ¶ 1).

63. This agreement provides that Media Central will purchase and install all equipment for BTA. BTA is contractually bound to utilize Media Central to arrange construction financing (Prism Ex. 9, ¶¶ 7-9).

64. Pursuant to paragraph 10 of the consulting agreement, BTA subjects itself to liability to Sterling if BTA defaults under any of the terms and conditions of the agreement (Prism Ex. 9). As a result, BTA cannot reject its contractual obligation to accept Media Central's acquisition and installation of equipment for the station without incurring such liability.

65. The agreement also designates Media Central "on a best efforts basis" to arrange financing for the construction of the television station, and provides "on qualification" that Media Central will offer its syndication program (Prism Ex. 9, ¶ 8).

66. Ms. Tuerk did not recall any discussions concerning whether or not Media Central would purchase the equipment for the station. She did not participate in any discussions concerning whether Media Central would offer its syndication program to the partnership. She did not participate in any discussions concerning whether Media Central was to be designated to arrange construction financing. Ms. Tuerk first became aware that there might be such an arrangement through filings in this proceeding. Acccord-

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[32] She and the other partners had agreed, prior to May 1982, with Preston's recommendation that Sterling would prepare the application (Tr. 27-72).

ing to Ms. Tuerk, upon learning that there might be an arrangement with Media Central, she spoke to Preston, Campbell and Dye to determine their knowledge of such an arrangement and to determine what Media Central was and what it did (Tr. 280-82).

67. Preston informed Ms. Tuerk that Media Central "offered excellent professional services to assist owners who needed professional help." Ms. Tuerk indicated interest (Tr. 183-84).

68. Preston would like BTA to enter into a management and operation agreement with Media Central. Under such an agreement, Media Central would provide turn-key construction of the station (Tr. 177). It would also provide for the complete management of day-to-day operations, including hiring all key station personnel, obtaining FCC licensing, selecting and obtaining all progamming, managing a sales force, and consulting and advising on all TV-related operations (Tr. 182-82).

69. Preston intends to advise Ms. Tuerk that engaging Media Central "would be a good way to consider" (Tr. 178). In the discussions with Preston thus far, Ms. Tuerk has indicated to Preston that she needed to know more about Media Central, but "at the proper time to make the decision, [she] was willing to make the decision" (Tr. 184).

70. It is Ms. Tuerk's present intention to manage the station and to perform the functions of a general manager. She will make the "ultimate decisions" as to the programming and understands that there are "people in the marketplace who put together programming packages" (Tr. 297-98).

71. Ms. Tuerk had made clear to Preston and Campbell that she was reluctant to become the general manager of the proposed station because of her lack of broadcast experience. They indicated to her that she would receive help and advice as to how to run the station (Tr. 258-59).

72. Preston, a Media Central director, ackowledged that Media Central plans to continue to seek to enter into management and operation contracts with new recipients of construction permits (Tr. 214). Preston further acknowledged that the growth of Media Central, and the value of his investment in it, are contingent on attracting new permittees to the Media Central program (Tr. 208). As noted, *supra*, Preston plans to urge Ms. Tuerk to enter into a management agreement with Media Central (Tr. 178, 183-84).

73. BTA is committed, under the consulting agreement, to the first part of the Media Central program; namely, syndication of ownership interests to obtain construction financing (Prism Ex. 9,

p. 4). CRCA has played an integral role in such syndications in the past. It syndicated the Canton, Ohio station through Canton 67, Ltd., a limited partnership (Prism Ex. 23, pp. 2–3). CRCA has firm commitments to syndicate the Honolulu, Hawaii and Cape Girardeau, Missouri television stations, in which Media Central is an equity participant, and has an unspecified number of additional commitments to provide syndication of television stations (Tr. 136–37).

74. Media Central is a 22 percent corporate general partner of Station WOAC-TV in Canton, Ohio. Until June 14, 1982, Media Central was a 40 percent corporate general partner in that station (Prism Ex. 4, p. 6). CRCA provided the financing for that station through a limited partnership placement (Prism Ex. 23, p. 2). According to CRCA (Prism Ex. 23, p. 3):

> "CRCA has been able to obtain on behalf of the partnership the turn-key construction as well as the operating management of the Canton Station from Media Central, Inc. .... a professional T.V. station management group. Media Central is providing for the complete management of day-to-day operations to include: • Hiring all key station personnel • Obtaining necessary FCC licensing • Selecting and obtaining all programming • Managing a sales force • Consulting and advising on all T.V. related operations."

75. As noted, *supra*, Media Central provides managerial services, on an independent contractor basis, to Stations WKCH-TV, Knoxville, Tennessee; WXTX(TV), Columbus, Georgia; WBUO (TV), Appleton, Wisconsin; WUSB-TV, Schenectady, New York; and WDBD-TV, Jackson, Mississippi (Prism Ex. 5, p. 5). The services provided to these stations are the same as those provided to stations in which Media Central has an ownership interest (Prism Ex. 5, p. 5; Tr. 182–83). These five stations are identified by Media Central as stations which participate in the company's program, which include syndication through the private placement of limited partnership interests (Prism Ex. 26, pp. 28–29).

### *(d) Decision That BTA Be a Limited Partnership*

76. By letter dated May 26, 1982, Abe Thiessen, the President of Sterling, returned a signed copy of the consulting agreement to Preston, without sending copies to any of the other partners. Sterling acknowledged receipt of Preston's $11,500 check and provided Preston a checklist for him to use in obtaining information regarding each principal and transmitting this information to

Sterling. In addition, Sterling provided agreements necessary to form a partnership (Prism Ex. 11).

77. On June 8, 1982, Price of Sterling wrote to Preston, advising Preston that Sterling had secured a transmitter site and that the application was nearly completed[33] (Prism Ex. 18). Price enclosed a partnership agreement for execution by the BTA principals.

78. In the June 8, 1982 letter, Price advised Preston that a partnership certificate should be filed in the courthouse of the county seat of residence of the general partner (Prism Ex. 18). This letter is silent as to whether the partnership agreement enclosed was a general or limited partnership. However, the advice relative to the filing of the partnership certificate indicates that Sterling had already advised Preston that BTA should be a limited partnership. Price advised Preston that he would forward the application to Ms. Tuerk for her signature. This is another indication that, by June 8, 1982, Ms. Tuerk had agreed to be the general partner.

79. The general partnership agreement, which three of the five partners executed, identified the partnership as Bellingham Television Associates, Ltd. (Prism Ex. 10). Ms. Tuerk agreed that Ltd. means Limited; nevertheless, she had no explanation for this partnership identification (Tr. 269). Nor could she explain why Preston identified the partnership as Bellingham Television Associates, Ltd. on May 17, 1982, when he signed the consulting agreement with Sterling (Tr. 269; Prism Ex. 9).

80. On July 1, 1982, Price wrote to Preston, enclosing a copy of the completed application for his review. Price asked Preston to become familiar with the application and then to forward it to Ms. Tuerk for signature[34] (Prism Ex. 19).

81. Preston explained that he received a copy of the application because he had been the contact person and because he was more familiar with the application process than Ms. Tuerk (Tr. 129).

82. Ms. Tuerk executed the application and the limited partnership agreement on July 7, 1982 (Tr. 290).

83. Prior to executing the application, Ms. Tuerk received some information regarding the contents of an application from Preston (Tr. 290). She did not, however, receive any information from Sterling. Ms. Tuerk has only had one contact with Sterling; sometime after she received the original application, she spoke

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[33] None of the other partners was copied on this letter.

[34] None of the other partners, including Ms. Tuerk, was copied on this correspondence.

with a representtive of Sterling (Tr. 256-57).

84. As noted, *supra*, Ms. Tuerk, as general partner, and Preston, Brooks, Campbell and Dye, as limited partners, signed a limited partnership agreement dated July 21, 1982.[35] The partnership was entered into pursuant to the Limited Partnership Act of the State of Washington (Prism Ex. 10).

85. Sometime prior to July 7, 1982, Sterling had suggested to Preston that Ms. Tuerk serve as the general partner because she was local, female and willing to make a commitment to work full time at the station and had been a friend of Campbell and Preston for many years. Sterling advised Preston that there would be a preference because Ms. Tuerk was a woman (Tr. 103).

86. Preston and Campbell raised with Ms. Tuerk the idea of forming a limited partnership, with her to serve as the sole general partner. They explained to her that if she were the sole general partner, and if she were to work full time at the station, then BTA's chance of obtaining the construction permit would be enhanced (Tr. 259-60).

87. Ms. Tuerk agreed to act as general partner, even though she had no prior broadcast experience, on the assurance of her partners that they would advise her regarding the operation and management of the station (Tr. 258). She also relied on Campbell's assurance that she would not be left holding all of the responsibility for the "general partnership" and that funds would be made available (Tr. 261).

### *II. The Caldwell Issues*

88. As noted, *supra*, resolution of the Caldwell issues was ruled by the Presiding Judge as necessary following the dismissal of the application of Caldwell Television Associates, Ltd. (CTA), the applicant against which the issues had originally been specified.[36] The issues call for an examination of Preston's participation in the initiation, preparation and prosecution of the CTA application, so as to determine whether Preston was the real party in interest in the CTA application. Also to be examined are the facts and circumstances surrounding an amendment to the CTA application, filed with the Commission on July 5, 1983, which represented that Preston was no longer a limited partner, having been replaced by William Frey. Also to be explored is whether CTA misrepresented

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[35] The name of the partnership, Bellingham Television Associates, Ltd., is the same as the name of the general partnership.

[36] *Memorandum Opinion and Order* (FCC 84M-3349), released August 1, 1984.

facts or was lacking in candor regarding its ownership and its partners' intentions relative to such ownership.

### *A. Representations Re Preston's Relationship With CTA*

89. CTA, in support of its Opposition to the Petition To Enlarge Issues, filed on February 10, 1984 by TRC Communications, Inc. (TRC), submitted a "Statement of Forrest L. Preston"[37] (CP Ex. 36). Preston represented that, since he entered into an unconditional agreement "on or about July 1, 1983," providing for the conveyance of his partnership interest in the CTA partnership, he had not held the authority to, and had not intended "to speak or act for the benefit of the partnership as a partner, with an ongoing stake in the above venture." He further represented that he had no intention of remaining as a partner subsequent to the agreement to convey his partnership interest in CTA to William A. Frey III (Frey) (CP Ex. 36, pp. 1-2).

### *B. Relationship of CTA To Media Central and Sterling*

90. As detailed, *supra* (pars. 42-43), Preston is a shareholder and director of both Media Central and CRCA, which, respectively, provide management services and financial syndication services to television permittees (Tr. 802-05, 910, 915-17).

#### *(1) Preston's Role Re Preparation of the CTA Application*

91. Preston first became interested in applying for the Caldwell television channel through his involvement in Media Central. Morton Kent (Kent), the president of Media Central, and also a shareholder and director of that company, introduced Preston to Abe Thiessen and James Price, respectively, President and Executive Vice President of Sterling[38] (Tr. 447-48, 922). Kent introduced Preston as someone who was planning to file a number of television applications (Tr. 447-48).

92. During the meeting, Preston told Price that applications for construction permits for television stations were to be filed for Portland, Oregon, Bellingham, Washington, Sacramento, California, and Caldwell, Idaho, and that he, Preston, would be in control of these applicants (Tr. 516-17, 547).

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[37] Preston, who submitted this statement "under penalty of perjury," also represented that Adam "authorized me to open a checking account in my community for the purpose of covering out-of-pocket expenses throughout the prosecution of the partnership's application before the FCC" (CP Ex. 36, p. 3).

[38] This is the Price identified in paragraph 47, *supra*. The record is silent as to the date of this meeting.

93. Prior to this meeting, Sterling had been monitoring the television table of allocations for Media Central and submitting reports to Kent on allocations which became available (Tr. 449). In one of these reports, Sterling had suggested that the Caldwell allocation to Kent (Tr. 449–50). At some point in time, but prior to the meeting discussed, *supra*, Kent indicated to Sterling that he had somebody to apply for Caldwell and that Sterling could not "sell" its services in that market to anyone else[39] (Tr. 456–57).

94. Price explained that Kent initially retained Sterling to provide the services of preparing a television application for the Caldwell market. Kent told Price that Preston was going to put a group together to file the application (Tr. 455–56). Kent retained Sterling to prepare CTA's application (Tr. 455–56, 655–56). Price characterized Preston as "the prime mover" in the Caldwell application (Tr. 469, 481–82). Preston contacted and interested Carl Campbell and Philip Brooks in becoming CTA principals (Tr. 978).

95. By letter dated June 26, 1981, Price of Sterling, at Kent's direction, sent agreements to Preston relative to potential television applications for Caldwell, Idaho, Bellingham, Washington and Salem, Oregon. Price asked Preston to identify a local contact for each of these applications (Prism Ex. 14).

96. By letter dated July 9, 1981, Price sent Preston "Earnings Potential Analyses" relative to various television markets; namely, Caldwell, Salem and Bellingham, to assist Preston as he spoke to "prospective principals" (Prism Ex. 15). The Earnings Potential Analysis for the Caldwell market had been prepared by Price at Kent's request, prior to the meeting with Preston, because Media Central was interested in building and managing a station in that market under a management contract (Tr. 513–14).

97. In November 1981, Preston called Elmer Adam, a businessman in Boise, Idaho,[40] and asked him if he was interested in becoming involved in the Caldwell project (Tr. 976). Adam called Preston back a few weeks later and told him that he was interested and would like to learn more about the project (Tr. 977). On November 20, 1981, Preston sent Adam a copy of the

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[39] Media Central had, prior to the Preston-Price meeting, commissioned Price to prepare an analysis of the Caldwell-Boise television market (Tr. 509–13; CP Ex. 3).

[40] Adam is in the real estate business in Boise. He has known Preston for 30 years. Preston was looking for nursing homes in the Boise area and Adam was helping him. Preston asked him if he was interested in becoming involved in "one of the television stations" (Tr. 976).

Earnings Potential Analysis for the Caldwell station which had been prepared by Price (CP Ex. 3, p. 1).

98. Also attached to the letter was an outline of the proposed transaction in connection with the Caldwell application in the hope that the outline would give Adam "a good feeling for the intentions of [the] partnership." Preston's outline envisioned the formation of a partnership which would apply for the Caldwell construction permit and which, upon the grant of the permit, would be replaced by a new limited partnership. That new limited partnership would own 49 percent of the station after the syndication was completed (CP Ex. 3, p. 2).

99. As noted, *supra*, Preston retained Sterling's services to prepare CTA's application (Tr. 455–56, 655–56). Sterling recommended that Preston also retain the law firm of McCampbell and Young to assist in prosecuting the application, and Sterling offered Preston a "package deal" whereby Sterling and McCampbell and Young would provide the engineering and legal services for a fixed fee until the application reached the B cut-off date (Tr. 658, 669). Preston was the first CTA partner to communicate with McCampbell and Young (Tr. 664).

100. Price explained that, whenever he had a question or recommendation with respect to the CTA application, he would call Kent or Preston because they were in charge of the application. He further explained that he was told by Kent and Preston that they were "in charge" of the application and that Sterling should contact Preston if they had any question or recommendation concerning the application (Tr. 461). Preston directed that all correspondence from Sterling concerning CTA was to go to him, including all bills for Sterling's services (Tr. 486–87, 557). Sterling's bills were sent to CTA in care of Preston's office at Life Care Centers in Cleveland Tennessee (Tr. 779).

101. Price recommended to Preston and Kent the site to be used in the Caldwell application and Preston approved the site (Tr. 461–62). Preston maintained that he had "a limited amount of exposure" to the site decision and that the site had been recommended to Adam, the general partner (Tr. 661–63). Adam explained that the site had been selected by Sterling before he became associated with CTA and that he knew that it was a good site (Tr. 980, 1029–30, 1077).

102. On November 21, 1981, Angelena Clayton, secretary and assistant to Preston, as Chairman of Life Care Centers of America, opened a bank account for CTA at the First Citizens

Bank, Cleveland, Tennessee. Preston had instructed her to do this (Tr. 580, 802). Ms. Clayton and Preston were the only authorized signatures on the account. According to Adam, the checking account was opened in Tennessee because Sterling and CTA's counsel were there and because the financing for CTA's station was going to come from that same bank (Tr. 988). Adam, who agreed to become a partner in CTA in December 1983, initially claimed that he directed Preston to open the bank account (Tr. 1033). However, when confronted with the fact that the account had been opened before he had agreed to become a partner, Adam corrected himself and acknowledged that he did not direct Preston to open CTA's account[41] (Tr. 1035).

103. Preston, by letter dated December 29, 1981, sent Price a deposit of $1,000 for the preparation of the Caldwell application[42] and identified the "local contact" as Elmer Adam (CP Ex. 5; Tr. 458-59). Preston sent a copy of this letter to Kent, President of Media Central, but did not send a copy to Adam. Preston and Kent were Sterling's contacts regarding the Caldwell application (Tr. 461).

104. By letter dated February 8, 1982, Kenneth H. Rayborn,[43] President of the First Citizens Bank of Cleveland, Tennessee, advised Preston that the bank was willing to loan $500,000 to CTA (CP Ex. 13, p. 2). Sterling had prepared the draft bank letter and given it to Preston and Kent.[44] Preston visited the bank to have the letter signed (Tr. 462, 689). The bank, by mistake, identified CTA as an applicant for the Portland, Oregon market, instead of the Caldwell-Boise market (CP Ex. 13, p. 2; Tr. 462-63). Preston was advised of this fact by Price of Sterling, who, upon receipt of the incorrect letter, contacted Preston and requested a corrected bank letter. Price, by letter dated April 16, 1982, reminded Preston of the need for a corrected letter (CP Ex. 13, p. 1). A corrected letter, dated February 8, 1982, was sent to Preston by the bank[45] (CP. Ex. 8).

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[41] As noted, *supra*, Preston, by letter dated November 20, 1981, had attempted to interest Adam in the CTA application and requested an early response (CP Ex. 3).

[42] He also enclosed a $1,000 deposit for the Bellingham proposal (CP Ex. 5).

[43] Rayborn was a shareholder of Media Central as late as 1983 (Tr. 673-74).

[44] Sterling did not send Adam a copy of this letter.

[45] Adam, the general partner, was not copied on this correspondence between Price and Preston. This bank letter provided that the security for the $500,000 loan was to be "the pledge of all unencumbered partnership assets and the personal guaranty of the partners," both of which Preston had indicated to Rayborn would be provided (CP Ex. 8).

105. By letter dated February 10, 1982, Preston was contacted by the equipment leasing company from which he had requested an equipment proposal for the CTA application[46] (CP Ex. 11).

106. Preston arranged this commitment letter, which provided for approximately $1.2 million in broadcasting equipment, contingent on the grant of CTA's application (CP Ex. 11). Price explained that Preston, as the "prime mover" behind the application, was responsible for obtaining these financial commitments for CTA (Tr. 469).

107. Adam acknowledged that Sterling had been doing work for CTA by the time he became involved in December 1981 (Tr. 1036). However, he never asked Preston if he had signed a consulting agreement with Sterling regarding CTA (Tr. 1038).

*(2) The CTA Partnership Agreement*

108. CTA's application was mailed to the Commission on February 14, 1982 and was stamped "received" by the Commission on February 17, 1982. The application was filed by Price of Sterling (Tr. 446, 520; CTA Application and transmittal letter dated February 14, 1982).

109. CTA is a limited partnership organized under and subject to the provisions of the Limited Partnership Act of the State of Tennessee. At the time the television application was filed, CTA was composed of one general partner, Elmer Adam, and three limited partners, Preston, Campbell and Brooks (CP Ex. 9, pp. 1-2). The "Limited Partnership Agreement" is dated February 8, 1982 (CP Ex. 9, p. 1). That agreement, which constitutes the entire agreement among CTA's partners, was signed by Adam, Campbell, Preston and Brooks (CP Ex. 9, pp. 20, 22). Preston and Brooks reside in Cleveland, Tennessee; Campbell resides in Wenatchee, Washington; and Adam resides in Boise, Idaho (CP Ex. 10, p. 1). According to Preston, the decision to become a limited partnership was made in February 1982 (Tr. 655). It was executed on February 8, 1981 (CP Ex. 9).

110. The Limited Partnership Agreement specifies that the principal office of CTA is to be located at 485 Central Avenue, N. E., Cleveland, Tennessee (CP Ex. 9, p. 4). CTA's address in its letterhead stationery is 3520 Keith Street, P. O. Box 3480, Cleveland, Tennessee (CP Ex. 19). This is Preston's business address at Life Care Centers of America (CP Ex. 5; Prism Ex. 23, p. 11).

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[46] Adam was not copied on this letter.

111. CTA's Limited Partnership Agreement specifies that Adam, the general partner, is to have exclusive control of the business and affairs of the partnership (CP Ex. 9, p. 8). The limited partners are not allowed to take part in the management of the partnership and cannot act on behalf of or bind the partnership (CP Ex. 9, pp. 8–11). The general partner has the duty to maintain proper and complete records and books of account for CTA, to cause a federal income tax return to be prepared for the partnership each year, and to mail an annual report to each limited partner regarding the business and operations of the partnership for that year (CP Ex. 9, pp. 6–7).

112. According to CTA's Limited Partnership Agreement, each limited partner's contribution was $4,100 to the capital of the partnership (CP Ex. 9, p. 23). The Certificate of Limited Partnership specifies that there were no agreements for additional contributions by any limited partner (CP Ex. 10, p. 2). The contribution of Adam, the general partner, would be to "direct" the partnership[47] (Tr. 681–83).

113. As limited partners, Campbell, Brooks and Preston were each entitled to and responsible for 28 p ercent of the profits and losses of the partnership. Adam, as the general partner, held the remaining 16 percent interest (CP Ex. 9, p. 23).

114. The Limited Partnership Agreement specifies that CTA's limited partners cannot assign any part of their partnership interest unless they first offer such interest in writing to the partnership and, if rejected by the partnership, to the other limited partners (CP Ex. 9, pp. 13–14; CP Ex. 10, p. 2). Any sale or transfer of any limited partnership interest in CTA not made in strict compliance with these vested rights of first refusal is null and void (CP Ex. 9, p. 14).

115. The partners in CTA executed a Certificate of Limited Partnership between February 10 and February 13, 1982 (CP Ex. 10). There is no record evidence establishing whether this certificate was ever filed. Under CTA's Partnership Agreement, the general partner is directed to file a Certificate of Limited Partnership and amendments thereto on behalf of the partnership (CP Ex. 9, p. 18). The Limited Partnership Act of the State of Tennessee requires such a certificate to be prepared and filed as a

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[47] Adam had advised Preston that he would be willing to serve as general partner of a limited partnership so that he might contribute services rather than money (Tr. 977). Preston detailed an agreement between CTA's partners that, after each limited partner had made his original contribution, if money was needed, whichever partner had money available would loan it to CTA (Tr. 682–83, 729).

prerequisite to the formation of the partnership (Tenn. Code Ann. § 61-2-102(a)). In Tennessee, the assignee of a limited partnership interest does not become a substituted limited partner until the Certificate of Limited Partnership is properly amended to reflect the substitution and filed (*Id.* at 61-2-119(e)).

### *(3) Preston's Role Re CTA Application After Its Submission to the Commission*

116. When Sterling submitted the CTA application to the Commission, it was received on February 17, 1982, missing the deadline for the acceptance of such applications (Tr. 475). The Commission's rejection of the Caldwell application led to the filing of a Petition For Reconsideration by legal counsel (Tr. 476).

117. A number of months after the request for reconsideration of the Commission's action rejecting CTA's application had been filed, the Commission accepted CTA's application and placed it on a B cut-off list, establishing July 7, 1983 as the deadline for filing amendments as a matter of right to the CTA application (BTA Ex. 7).

118. On the same date, February 14, 1982, that Price mailed the CTA application to the Commission, he also sent to Adam the public inspection copy of the application, along with instructions on how to keep the public file and to publish local notice of filing of the application (BTA Ex. 6, p. 1). Price, by letter dated April 22, 1982, sent Preston a copy of CTA's application,[48] along with a copy of the April 20, 1982 letter to Price had sent to Adam, directing Adam to place some amendments to CTA's application in the CTA public inspection file (CP Ex. 14, pp. 1-2). On June 8, 1982, Adam received from Sterling further application amendments to be included in CTA's public file (BTA Ex. 6, p. 7). Preston was copied on that letter.

119. As noted, *supra*, CTA filed a Petition For Reconsideration of the rejection of its application and a Consolidated Reply to several oppositions to its petition (CP Ex. 17). Price, by letter dated April 2, 1982, sent Adam the public file copy of the Petition For Reconsideration, along with instructions for publication of a new local notice (BTA Ex. 6, p. 3). Price, by letter dated May 10, 1982, sent Preston a copy of the Consolidated Reply that was filed (CP Ex. 17). Adam and the other CTA limited partners were not copied on Price's letter to Preston.

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[48] On May 7, 1982, Ms. Clayton sent Campbell and Brooks a copy of the CTA application filed with the Commission (CP Ex. 15).

120. On September 23, 1982, Preston wrote to counsel for CTA, on CTA letterhead stationery, to inquire about a statement for legal services which Preston had received from CTA's counsel[49] (CP Ex. 19, p. 1). Preston requested counsel to confirm Preston's understanding that the legal fees represented in the statement were covered by the initial contractual agreement between CTA and Sterling. Preston signed the letter to counsel as "Managing Partner" of CTA. Campbell, Brooks, Adam and Price of Sterling were copied on this letter. Adam did not authorize Preston to write this letter (Tr. 1063).

121. On that same date, September 23, 1982, Preston sent a letter to Price of Sterling, requesting an update on the status of CTA's application pending before the Commission (CP Ex. 20). Campbell, Brooks and Adam were copied on this letter. Adam did not direct Preston to write this letter. Significantly, Adam did not know who Morton Kent was who was indicated as being sent a copy of this letter[50] (Tr. 1064). Preston also signed this letter as "Managing Partner"[51] of CTA (CP Ex. 20).

122. Price responded by letter dated September 28, 1982 to Preston's request and advised Preston that counsel for CTA would furnish Preston with "the update you have requested" (CP Ex. 22). Price sent a copy of this letter to counsel for CTA, but not to any of the other partners in CTA. Sterling's letter was addressed to "Forrest L. Preston, Managing Partner, Caldwell Television Associates, Ltd." (CP Ex. 22). Price explained that he was not surprised that Preston referred to himself as managing partner because "he's always been the managing partner" and because it was understood that Preston was going to have control of the group of stations he was applying for (Tr. 539). On November 8, 1982, counsel for CTA sent a letter to Preston, addressing Preston's concerns regarding counsel's statement for legal fees and explaining that the "arrangements" with Sterling and CTA for a flat fee did not include seeking reconsideration of the dismissal of CTA's application (CP Ex. 23). Counsel did not send a copy to any of the other partners in CTA.

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[49] Counsel's "Statement," dated September 8, 1982, was addressed to Preston and marked "Past Due" for $1,165.74 (CP Ex. 19, p. 2).

[50] The copy of this letter shows that Kent was blind copied, meaning that the other partners were not informed that Kent was receiving a copy (CP Ex. 20).

[51] Preston was also a limited partner in Sacramento Television Associates, Ltd., an applicant for a television station in Sacramento, California (Tr. 710–11). Preston, also on September 23, 1982, signed a letter written on behalf of that applicant and on that applicant's letterhead stationery as "Managing Partner" (CP Ex. 21).

123. Although Price was well aware that Preston represented to the Commission that he was a limited partner in CTA, he never questioned Preston's active role in the application because he knew that the CTA application was a Media Central application. Price explained that Media Central's purpose was to establish a network of television stations (Tr. 470). Price understood that after the construction permit was obtained, the station would be syndicated and professionally managed by Media Central[52] (Tr. 493).

### *(4) Preston's Role Re CTA's Bank Account*

124. As noted in paragraph 102, *supra*, Angelena Clayton, Preston's assistant, opened the CTA bank account on November 21, 1981, at the First Citizens Bank, Cleveland, Tennessee. The account was opened at Preston's request in the name of Caldwell Television Associates, Ltd.[53] This name was given to Ms. Clayton by Preston (Tr. 577-78, 580, 609). Ms. Clayton and Preston were the only authorized signatories on this account. From November 1981 to September 1984, the bank statements on CTA's checking account were sent to Preston's office (BTA Ex. 9, pp. 1-46).

125. All the checks drawn on the account have been signed by Ms. Clayton, who had custody and control of the checkbook until February 1984 when, upon counsel's advice, Preston sent it to Adam[54] (Tr. 606). All payments for services rendered to CTA were made by Ms. Clayton from this account (Tr. 606). She regularly maintained CTA's account and check register (Tr. 587). She also reconciled the account every month and made all deposits (Tr. 588; 600-02). Ms. Clayton also maintained a file for billings and correspondence related to CTA (Tr. 620). Adam has never asked Ms. Clayton to see this file (Tr. 620, 630-31).

126. On December 29, 1981, Ms. Clayton wrote a $1,000 check to Sterling on the CTA account. However, at that time, CTA only had the initial $50 deposit in its account. Preston had $1,000 transferred from the Bellingham Television Associates account to CTA's account on January 4, 1982 to cover this check[55] (BTA Ex. 9, pp. 4-5).

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[52] Preston acknowledged that, at the time CTA's application was pending before the Commission, syndication was "a possibility" (Tr. 804).

[53] Fifty dollars was deposited by Ms. Clayton to open the account (BTA Ex. 9, p. 2).

[54] Adam has not written any checks on the account (Tr. 606).

[55] This deposit slip was inadvertently dated January 4, 1981 (BTA Ex. 9, p. 5). This transfer of funds took place prior to the formation of the CTA partnership on February 8, 1982 or the BTA partnership on July 21, 1982.

127. By a CTA check dated March 10, 1982, Ms. Clayton paid Sterling the $11,500 that remained owed it for its services in preparing the CTA television application (BTA Ex. 9, p. 8). On March 11, 1982, Campbell, Preston and Brooks deposited in CTA's account their capital contributions to the partnership (BTA Ex. 9, p. 8). Brooks and Campbell each contributed $4,100, the amount that was specified in CTA's Limited Partnership Agreement. Preston contributed $4,400, with the $300 above his $4,100 contribution considered a loan to CTA. On May 26, 1982, an additional $200 of Preston's money was deposited in CTA's account (BTA Ex. 9, p. 11). Again, on August 21, 1982, $100 of Preston's money was deposited in CTA's account (BTA Ex. 9, p. 16). As detailed, *infra*, Preston's check for $5,000 to CTA as a purported loan was deposited in CTA's account on February 14, 1984 (BTA Ex. 9, p. 38). Adam believes that CTA only owes $5,000 to Preston (Tr. 1055). On one occasion, on September 29, 1983, $100 from the account of Portland Television Associates (Preston is a partner in the Portland, Oregon applicant) was deposited in CTA's account to pay CTA's expenses (BTA Ex. 9, p. 32). Adam expressed the belief that the $1,000 loaned to CTA by the Bellingham applicant did not constitute a debt for CTA (Tr. 1055-58). CTA repaid the money received from BTA[56] (BTA Ex. 9, p. 11). Adam did not recall if he directed Ms. Clayton to repay BTA's loan (Tr. 1055-56). The record is silent as to whether CTA repaid the $100 received from the Portland applicant.[57]

128. Under CTA's Limited Partnership Agreement, only the general partner has the power to borrow money on behalf of CTA (CP Ex. 9, p. 9; Tr. 733). Preston could not recall if he consulted Adam before CTA borrowed money from the Bellingham and Portland applicants (Tr. 733).

129. Preston did not know the total amount of money he has loaned to the partnership; he did not know the terms of the loans; nor has he sought repayment of the loans (Tr. 749).

130. Preston explained that when Adam asked him how CTA would meet its operating expenses, he, Preston, agreed to loan money to the partnership whenever necessary (Tr. 734).

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[56] By a CTA check dated May 21, 1982, Ms. Clayton repaid BTA the $1,000 of its funds advanced to CTA by Preston (BTA Ex. 9, p. 11).

[57] Adam did not recall any transaction taking place between CTA and the Portland applicant (Tr. 1055).

### *(5) CTA's Explanation For Preston's Role in CTA*

131. Both Adam and Preston explained that Adam had, at some unspecified point in time, requested Preston to assist him with the affairs of the partnership (Tr. 671-73). According to Preston, Adam had requested assistance in performing some of the "minute" duties of the partnership (Tr. 696). Adam related that he had "asked Forrest Preston to do errands for us down there, do whatever needs to be done that is easier for him to do than it was for us to do from Boise, and [I] asked him to consult with me on anything that he did do" (Tr. 1005). Preston indicated that Adam's duties in connection with CTA were to deal with the consulting firm, to direct the site selection process[58] and to publish the local notices (Tr. 719, 1074).

## *C. The July 5, 1983 Amendment Reporting Preston's Withdrawal From CTA*

132. As detailed in paragraphs 116-17, *supra*, the CTA application was initially rejected by the Commission because it was late filed. However, the Commission reconsidered and accepted CTA's application, placing it on a July 7, 1983 B cut-off list.

133. On June 6 and 9, 1983, Stone, CTA counsel, wrote to CTA's partners regarding the possibility of withdrawing Preston from the partnership by the B cut-off date of July 7, 1983 in order to avoid the diversification problem that would result by virtue of Preston's other media interests (BTA Ex. 7, pp. 1-5). Counsel noted: "[I]t may very well be to our advantage for [Preston] to divest himself of the Caldwell application partnership, with his interest going to one of the other partners" (BTA Ex. 7, p. 1).

134. Price had also advised Preston to withdraw from the partnership by the cut-off date because his involvement in several other television applications might place CTA at a disadvantage under the diversification criteria[59] (Tr. 489-91, 498). Preston informed Price that he wanted to stay in the applicant and keep "control of the group"[60] (Tr. 491-93). Price and Preston discussed

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[58] As noted, *supra*, the site had been selected before Adam became a partner of CTA.

[59] Price explained that other Media Central principals encountered this media diversification problem after they began to acquire broadcast interests and that they then sought to recruit people whom they could control to apply for construction permits, such as neighbors, relatives and minorities whom they considered "weak but trustworthy" (Tr. 498-99).

[60] Preston had told Price that the CTA television station would be syndicated and professionally managed by Media Central (Tr. 493). To ensure that this

the idea that, at a later time, it might be possible for Preston "to recoup" his interest in CTA if a person close to Preston was selected as a surrogate limited partner and was willing to surrender the interest after the permit was granted (Tr. 492-98, 558-60). Preston explained that he discussed his withdrawal from CTA with his partners and they approved (Tr. 764). Adam did not notify CTA's limited partners of Preston's withdrawal. However, CTA's counsel did (Tr. 1025-26). Preston did not offer his partnership interest to CTA or to the limited partners, as required by the terms of the partnership agreement (CP Ex. 9, p. 14; Tr. 1027).

135. On July 1, 1983, counsel for CTA wrote to CTA's partners to advise them that "as you all are probably aware, consistent with our earlier correspondence, [William] Frey has been proposed as substitute limited partner for Forrest Preston" (BTA Ex. 7, p. 6). Counsel pointed out that, as a result, CTA would be able to prosecute its application without the disadvantages attending to Preston's ownership in other broadcast stations.

136. On or about July 5, 1983, counsel for CTA filed a B cut-off date amendment with the Commission reporting the substitution of William Frey (Frey) for Preston as a limited partner in CTA.

137. Frey has been Preston's employee at Life Care Centers of America since 1981 (Tr. 365-68). Preston recommended Frey as the "new" limited partner (Tr. 496). Frey was selected by Preston and Price from a list of "nominees" suggested by Preston. Price explained that by selecting Frey, Preston could continue exercising influence in the Caldwell applicant after his purported withdrawal and could be assured that the Media Central plan for syndicating CTA would be preserved (Tr. 496-99, 559-60).

138. On or about July 1, 1983, Preston contacted Frey regarding Frey's participation in the partnership (Tr. 368-69). Preston and Frey had a five-minute telephone conversation during which Frey accepted Preston's offer to be a substitute limited partner in CTA[61] (Tr. 368-69, 386-87).

139. During this telephone conversation, Preston did not outline for Frey the terms of the agreement between them (Tr. 369, 386). Preston did not tell Frey what his limited partnership interest would cost or what percentaage of CTA's ownership he

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happened, it was essential that Media Central had a group that they could control (Tr. 558-60).

[61] This conversation was the inception of Frey's interest in investing in a television station (Tr. 368). As noted, *supra*, Preston was the Chairman of the Board of Life Care Centers at the time this conversation took place (Tr. 368).

was acquiring (Tr. 370, 379–82, 386–87). Shortly after talking with Preston, Frey received materials from CTA's counsel which set forth the percentage of ownership he was acquiring (Tr. 370). The record is not clear as to when he first received this material. During his December 1984 deposition, Frey indicated that he did not review the materials until shortly before his deposition was taken (Tr. 370–83).

140. During their five-minute conversation, Preston and Frey did not discuss payment terms or how long Frey would have to pay for this limited partnership interest (Tr. 387, 417). Nor did they discuss whether Frey would reimburse Preston for Preston's capital contributions to the partnership (Tr. 417). Lastly, they did not discuss whether Frey was assuming any obligations that Preston had to the partnership or any contributions Preston had already made to the partnership (Tr. 433–34).

141. Frey emphasized that he had agreed to substitute for Preston as a limited partner and did not discuss with Preston whether he would have to pay for the interest[62] (Tr. 386–87, 417, 425–26, 431–32).

142. Preston claimed that he gave his partnership interest to Frey free of charge, even though, had he wanted to sell it, he was sure "there would have been some market value to it"[63] (Tr. 757–58). Instead of selling his interest to Frey, Preston maintained that he withdrew from the partnership and Frey entered, assuming the obligations of a partner (Tr. 760–61).

143. Frey had not been informed that Adam was not obligated to contribute any money towards the prosecution of the application. He assumed that as one of four partners, he was responsible for one-fourth of the partnership's expenses and this was his understanding when he entered into his agreement with Preston (Tr. 390–91). Adam expressed the view that Frey was mistaken if he assumed he was responsible for only one-fourth of the partnership's expenses since, according to Adam, the three limited partners were each responsible for one-third of the partnership's expenses[64] (Tr. 1022).

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[62] Frey testified at his December 18, 1984 deposition, however, that he would be buying his limited partnership from Preston, not from the limited partnership (Tr. 433). He further testified at his deposition that he, at some point in the future, would work out an agreement with Preston to pay him for his partnership interest (Tr. 436–38).

[63] Later, Preston had maintained that he didn't consider his partnership interest "as having at that time any value other than the upside of eventually becoming a permit" (Tr. 761).

[64] Frey now believes that he is responsible for 28 percent of the partnership's expenses (Tr. 409).

144. At the time Frey, who is a certified public accountant, agreed to become a limited partner, Preston did not provide him with any estimate of what the partnership's costs for applying for a television station might be or what Frey's individual costs might be (Tr. 388, 399).

145. Adam did not discuss with Frey his responsibilities as a limited partner in CTA. Adam did not check Frey's financial qualifications to become a limited partner. Frey did not provide a financial statement to any of the CTA partners prior to joining CTA (Tr. 411). It was enough assurance for Adam that Preston believed that Frey would be a good substitute limited partner (Tr. 1022-24).

146. Sometime after the brief telephone conversation between Frey and Preston, Stone, counsel for CTA, had a brief telephone conversation with Frey. Counsel asked Frey about his media interests and his citizenship. No other matters were discussed (Tr. 392).

147. As of December 1984, 18 months after he had agreed to become a limited partner in CTA, Frey had not read CTA's Limited Partnership Agreement, was not aware of his rights as a limited partner of CTA and had no knowledge of whether his contribution to CTA, if any, would be in cash or in kind (Tr. 393-94). In the period that he has been a limited partner, Frey has not made any capital contribution to CTA, has never been called upon to contribute, and has never inquired from the other partners about this (Tr. 394-95, 419-20). Frey has not incurred any expenses in connection with the CTA partnership (Tr. 418). Frey acknowledged that the extent of his financial obligations to the partnership are "unclear" (Tr. 426). Nobody has discussed with Frey if he has any financial responsibility toward CTA (Tr. 427).

148. Frey has not signed CTA's Limited Partnership Agreement and has never talked to Adam, Campbell or Brooks to determine if they agreed to his admittance as a partner (Tr. 395-97). CTA's Certificate of Limited Partnership was not amended to reflect Preston's withdrawal and Frey's interest (Tr. 1027).

149. Frey never met Adam, CTA's general partner, prior to the hearing in this proceeding in February 1985 (Tr. 398). Frey has never corresponded with Adam (Tr. 398-99). Frey has never inquired about Adam's financial viability and, as recently as December 1984, did not know what the debts of the limited partnerships were or whether the other limited partners had made

any capital contributions to CTA.[65] Nor did he know who was providing accounting services to CTA and where and by whom CTA's bank account was being kept (Tr. 399-402). In addition, although CTA's Limited Partnership Agreement requires the general partner to furnish to each limited partner the annual financial statement of the partnership (CP Ex. 9, p. 7), Frey has never received any such document and does not know whether he is entitled to it. Frey did not know if there have been partnership meetings, whether in person or by telephone, and, consequently, has never attended any partnership meeting (Tr. 408). Frey's only knowledge of the financial affairs of the partnership is that Preston told him, at some unspecified point in time, that the expenses of the partnership were $17,000 (Tr. 409). Frey assumed, when he became a limited partner, that the expenses incurred to date on behalf of CTA had been paid. However, he did not discuss with Preston or with any of the other partners whether he would have to reimburse Preston for the expenses Preston had incurred with respect to the partnership (Tr. 416-17, 433-34).

150. As more fully discussed, *infra*, the CTA application was dismissed with prejudice on May 29, 1984 following a settlement agreement reached between CTA and the competing applicant, TRC. No one communicated with Frey to tell him that the CTA application was going to be dismissed (Tr. 412). Neither his partners nor his legal counsel ever advised Frey that CTA had reached a settlement agreement with TRC (Tr. 413). He was not asked whether he agreed to the terms of the settlement agreement, nor was he otherwise consulted about the settlement (Tr. 412-13). Frey does not know the status of the settlement payment due CTA and has made no inquiries about it (Tr. 414).

151. Frey was not aware, at the time of his December 1984 deposition, if a tax return had been filed for CTA for 1983 (Tr. 414). He assumed that there were no tax benefits resulting to him from his involvement with the partnership because he did not receive the appropriate documents advising him of the tax loss or gain accruing to him as a partner (Tr. 415).

152. Frey was not aware of the dispute between CTA and Sterling concerning Sterling's involvement with another applicant in the Caldwell market[66] (Tr. 421-23). Frey is aware that CTA has

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[65] Frey has never received a financial report concerning the partnership and was not aware that the CTA partnership agreement requires that the general partner provide financial statements to all the partners once a year (Tr. 403; CP Ex. 9, p. 7).

[66] This dispute is discussed, *infra*.

legal bills outstanding, but has not inquired if and when they are going to be paid (Tr. 423-25).

153. Frey acknowledged that he has done nothing with respect to his partnership interest in CTA and has taken no actions in connection with the partnership (Tr. 420, 439-40).

### *D. Preston's Role in CTA Subsequent To July 5, 1983*[67]

154. Price explained that Preston's withdrawal from the partnership did not change his relationship with CTA and that Preston remained Price's principal contact. When a problem arose concerning CTA, Price called Preston (Tr. 499).

#### *(1) The Dispute With Sterling*

155. On August 26, 1983, Preston wrote to Price of Sterling indicating a need to meet with him to discuss their overall relationship and, specifically, "the Caldwell-Boise, Idaho situation" as it related to Sterling "and its interests versus Caldwell Television Associates, Ltd. and its interests"[68] (CP Ex. 28).

156. One month later, September 26, 1983, Prston wrote to Abe Thiessen, president of Sterling, on CTA's letterhead stationery, and signed the letter as "Partner" of CTA (CP Ex. 29). Preston remitted payment of the amount then due Sterling from CTA. The letter made reference to a conversation the previous Thursday between Preston and Thiessen and suggested that Thiessen may or may not hear more from CTA in the future. Preston signed the CTA check for $115 in full payment of Sterling's services (BTA Ex. 9, p. 31). Copies of Preston's letter to Sterling were sent to Adam, Campbell and Brooks and to CTA's and Preston's counsel.[69] A copy was not sent to Frey. Preston had visited Sterling's office in Chattanooga, Tennessee to discuss this matter[70] (Tr. 504-05, 768-69). Price had no communications with any of the other partners in CTA concerning this dispute (Tr. 506). Adam learned that Sterling had filed its own application in the Boise market through Sterling's local newspaper notice of the filing. Adam did not do anything when he saw that local notice

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[67] On July 5, 1983, CTA filed an amendment to its application reporting the removal of Preston and the substitution of Frey in his place as a limited partner.

[68] Sterling had filed an application for another channel in the Caldwell-Boise market.

[69] Ms. Clayton only sent carbon copies when Preston specifically directed her to do so (Tr. 632).

[70] Hal Dixon, a Media Central shareholder, accompanied Preston to this meeting (Tr. 504).

(Tr. 1074). Adam did not instruct Preston to discuss this matter with Sterling (Tr. 1074-75). Adam never knew, until the hearing, that Preston had a meeting with Sterling concerning this dispute (Tr. 1076).

157. As noted in paragraph 120-21, Preston, on September 23, 1982, sent a letter to CTA counsel and another letter to Price, both of which he signed as "Managing Partner." Preston, on both of these letters, signed "Forrest" over his typewritten name, "Forrest L. Preston." Directly below his name was typed "Managing Partner" (CP Exs. 19 and 20). The September 26, 1983 letter to Thiessen was similarly signed "Forrest" over the typewritten name, "Forrest L. Preston," and directly below his name was typed "Partner" (CP Ex. 29).

158. These three letters were dictated by Preston to Ms. Clayton, his secretary. She transcribed and typed the letters which were signed by Preston with the titles indicated, *supra*, appearing on the letters (Tr. 632-36). Ms. Clayton could not recall whether Preston directed her to use the title "Managing Partner" on the September 23, 1982 letters, or whether she "used that term" herself (Tr. 632-33). She explained that Preston was involved in 25-30 partnerships in September 1982 and that it was difficult for her "to keep up with his specific title in each one." She acknowledged that if Preston had not directed her to use the title "Managing Partner" on the September 23, 1982 letters, she affixed it because she believed that was the appropriate title to use (Tr. 633-35).

159. Preston maintained that his normal practice was to dictate his letters and that he would not indicated either his name or title (Tr. 950-51). He explained that, due to his extensive investments and other business endeavors over the years, he had a "volume of correspondence" which he signed (Tr. 691-92). While he read this correspondence before signing it, he further explained that he had "a number of different titles" in the different partnerships and that he did not proofread such titles (Tr. 691-92, 711).

160. Preston did not realize that the title "Managing Partner" could be considered "as a person managing that partnership" (Tr. 711).

161. After receiving a copy of Preston's September 23, 1982 correspondence, Adam, CTA's general partner, questioned Preston about his use of the term "Managing Partner." Preston indicated that he did not have an explanation and couldn't understand it himself (Tr. 1062). Having looked into the situation, Preston

advised Adam that it was "a typographical error" on the part of his secretary (Tr. 1063).

162. With reference to the September 26, 1983 letter by Preston, where he signed over the title "Partner" on a CTA letter head, Ms. Clayton explained that she probably used such a title because she was typing other correspondence and affixed the title "Partner" without thinking (Tr. 636). Preston explained that he wrote the September 26, 1983 letter and met with Sterling because he was disappointed with Thiessen and Price that they would file an application for a television station in the Caldwell-Boise market. He considered it "old business" — a "personal affront" to him (Tr. 769–72).

163. At the meeting with Sterling, Preston informed Sterling that he had talked to Morton Kent and obtained legal opinions from two communications firms that Sterling's actions in filing its own application for the Caldwell-Boise market constituted a conflict of interest. Price characterized Preston's action as a threat that there might be "a problem made over it" (Tr. 505). Preston suggested that Sterling refund a portion of the consulting fee paid by CTA (Tr. 776–77).

### *(2) Preston's Withdrawal As A Signatory on CTA's Bank Account*

164. As noted in paragraph 102, *supra*, Ms. Clayton and Preston became the signatories on the CTA bank account when it was opened by Ms. Clayton on November 21, 1981. Preston remained a signatory until February, 1984.[71]

165. On February 13, 1984, Preston sent Adam CTA's checkbook along with a blank signature card for Adam to sign. According to Preston's letter, counsel for CTA had "suggested that it is probably better that you [Elmer Adam] handle the checkbook in the future since I [Forrest Preston] had withdrawn from the partnership a number of months ago" (CP Ex. 32; Tr. 1013–15). No one was sent copies of this letter.[72] The new signature card sent to Adam was also signed by Ms. Clayton and does not indicate the date it was filed with the bank (BTA Ex. 10).

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[71] Ms. Clayton remains a signatory on the account (Tr. 604–06).

[72] This letter immediately followed the filing by a competing applicant in the Caldwell proceeding, on February 10, 1984, of the motion to enlarge issues against CTA which was eventually granted and which resulted in the so-called Caldwell issues now being litigated in this proceeding (*Memorandum Opinion and Order*, FCC 84M–1191 (MM Docket Nos. 82–746, *et al.*), released March 9, 1984).

166. Until September 1984, Ms. Clayton received and reconciled bank statements for CTA's bank account which were sent to CTA in care of Life Care Centers of America (Tr. 587-88, 607; BTA Ex. 9).

### *(3) Preston's February 9, 1984 Advance of $5,000 To CTA*

167. Preston caused his personal check dated February 9, 1984 in the amount of $5,000 to be deposited into CTA's account (CP Ex. 31; BTA Ex. 9, p. 38; Tr. 746). This check was deposited into CTA's account on February 14, 1984 and the funds were used by CTA to pay CTA's legal fees.[73]

168. On February 20, 1984, Ms. Clayton sent to Adam an unexecuted note for a $5,000 "loan" from Preston to CTA, requesting that Adam sign the note (CP Ex. 33). An executed note was not produced by CTA or Preston (Tr. 1003-04). Preston claimed that he made this "loan" to CTA because Adam asked him (Tr. 741-42). Adam explained that Preston had "from the very beginning . . . told us that he could or would be able to make avalable funds if we ever needed them . . . ." Brooks and Frey, limited partners of CTA at the time this loan took place, resided in Cleveland, Tennessee and had means to provide a $5,000 loan to CTA (Tr. 988-89). Adam never contacted Frey regarding the need for a $5,000 loan (Tr. 1077-78).

169. Preston has not been repaid for the $5,000 "loan" or any other loans he has made to CTA (Tr. 747). He has agreed to wait for repayment until CTA's "application dismissal arrangement was complete . . . " (Tr. 748). He understands that CTA is owed $2,500 in connection with its settlement agreement (Tr. 748). Preston never discussed whether he would be repaid just the principal amount of the loans or whether he would receive principal and interest (Tr. 748-49).

### *(4) Preston's Receipt of Legal Bills*

170. As noted, *supra*, Preston received a legal bill addressed to him in September 1982 (CP Ex. 19, p. 2). Preston continued to receive some copies of legal bills related to CTA after July 1983 (Tr. 651). Preston acknowledged that most legal bills were sent to Adam and copies were sent to him (Tr. 694, 697).

### *(5) Adam's Withdrawal As General Partner and Dismissal of CTA's Application*

171. In March 1984, Adam decided to withdraw as CTA's

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[73] The check to counsel was dated February 9, 1984 (BTA Ex. 9, p. 38).

general partner because he wanted to "move onto other things" and wanted "to get away from the Caldwell television thing" (Tr. 998-99, 1044-45). Adam needed to make arrangements "to make some money" (Tr. 999).

172. Adam contacted CTA's counsel and indicated his desire to withdraw from the project and requested counsel to contact counsel for the competing applicants in the Caldwell proceeding in an effort to reach a settlement (Tr. 999-1001). Adam was concerned about his continuing commitment to manage the television station proposed by CTA in light of the fact that he felt a need to pursue other work immediately (Tr. 1045). It was Adams decision to pursue other goals which led to his decision to seek a settlement of the proceeding (Tr. 1047). Adam contacted Preston and advised him of his decision to withdraw (Tr. 1048). Adam, who was very embarrassed, told Preston he realized his withdrawal would cause "great financial loss" to the limited partners (Tr. 792-93). Preston told him he shouldn't do it. Adam informed Campbell of his intention to withdraw (Tr. 1098). As reflected in the Presiding Judge's *Memorandum Opinion and Order* (FCC 84M-3349), released August 1, 1984, the CTA application was dismissed by Judge Harrison on May 29, 1984.

173. Adam's decision to withdraw prompted a settlement with the competing applicant, TRC (Tr. 1044). Adam discussed the settlement with Preston (Tr. 786, 1043-44). Adam did not personally discuss the settlement with Campbell, Brooks or Frey, his limited partners (Tr. 1039-40). Adam recalled that he was informed by CTA counsel that Brooks and Campbell were consulted about the settlement, but he could not recall being informed that Frey was consulted (Tr. 1040-43). Frey, in fact, was never consulted about the settlement (Tr. 413).

## *Ultimate Findings and Conclusions*

1. This proceeding involves the mutually exclusive applications of Bellingham Television Associates, Ltd. (BTA) and Prism Broadcasting Corporation (Prism) for authority to construct a new commercial television broadcast station on Channel 64 at Bellingham, Washington. In addition to the comparative issue relative to the choice to be made between these two mutually-exclusive applicants, there are qualifying issues which have been designated relative to the BTA application. It is well established that only basically qualified applicants are entitled to comparative consideration. *Louis Adelman*, 28 FCC 432 (1960), *aff'd sub nom. Guinan Radio Co. v F.C.C.*, 111 U.S. App. D.C. 371, 297 F.2d 782

(1961). For this reason, the qualifying issues specified relative to the BTA applicant will be considered and disposed of before addressing their comparative strengths and weaknesses.[74]

2. Forrest L. Preston (Preston), who is listed as a 20 percent limited partner in BTA, was also listed as a limited partner in Caldwell Television Associates, Ltd. (CTA), applicant for a construction permit for a new VHF television station on Channel 9 at Caldwell, Idaho. In the CTA application, as originally filed on February 17, 1982, Preston was listed as a 28 percent limited partner of CTA. However, on July 5, 1983, two days before the B cut-off date for the CTA application, CTA filed an amendment which purported to remove Preston as a limited partner and replace him with William A. Frey, III (Frey). The Presiding Judge in the Caldwell, Idaho proceeding (MM Docket Nos. 82-746, *et al.*), by *Memorandum Opinion and Order* (FCC 84M-1191), released March 9, 1984, added issues to determine whether Preston had terminated his interest in CTA and whether he was a real party in interest in the CTA application, and, also, to determine whether, in the amendment to the CTA application filed July 5, 1983, CTA misrepresented facts or was lacking in candor concerning its ownership and its partners' intentions relating to that ownership.

3. Following dismissal of the CTA application, the Presiding Judge in this proceeding ruled that resolution of these Caldwell issues was necessary relative to the basic and/or comparative qualifications of BTA. The so-called Caldwell issues called for an examination of Preston's participation in the initiation, preparation and prosecution of the CTA application so as to determine whether Preston was the real party in interest in the CTA application. Also examined under these issues were the facts and circumstances surrounding the CTA amendment filed July 5, 1983, which represented that Preston was no longer a limited partner, having been replaced by Frey, and, also, the question as to whether CTA misrepresented facts or was lacking in candor concerning its ownership and its partners' intentions relative to such ownership.

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[74] Issues of misrepresentation or lack of candor with respect to the true ownership of an applicant have historically been considered as raising a question as to whether that applicant has the requisite qualifications to be a Commission licensee. The *Memorandum Opinion and Order* (FCC 84M-3349), released August 1, 1984, specifying these issues made clear that the so-called Caldwell issues might impact on the basic and/or comparative qualifications of BTA to be a liicensee (par. 3).

4. The CTA application, as filed on February 17, 1982, reported that CTA was comprised of one general partner, Elmer Adam, and three limited partners, Preston, Campbell and Brooks, and that, as limited partners, Campbell, Brooks and Preston were each entitled to and responsible for 28 percent of the profits and losses of CTA and that Adam, as the general partner, held his 16 percent interest in return for his managing and directing the partnership. The Presiding Judge agrees with BTA that the so-called Caldwell issues require a determination as to the relationship of Preston both before and after his announced withdrawal as a limited partner in CTA, as well as the intentions of the CTA partners with respect to the partnership's ownership. The findings establish that Preston's conduct and actions on behalf of the CTA partnership belie CTA's claim that it is a *bona fide* limited partnership and that Preston was simply rendering assistance to the CTA partnership with the express authorization and approval of Adam, the general partner. The findings make clear that the idea to form CTA and file the Caldwell television application originated with Preston and that it was he who interested the other partners, including Adam, the general partner, in having an interest in the CTA application. Preston was both the initiator and coordinator of the CTA application. It was he who contacted Sterling and counsel and arranged for the preparation of the application. He was the individual Price, an official of Sterling, contacted concerning the preparation of the CTA application. It was Preston who negotiated and obtained the $500,000 bank loan to CTA, and it was he who negotiated and obtained the $1.2 million equipment leasing agreement with the equipment leasing company.

5. Price's testimony makes clear that Preston was the "prime mover" behind the application and was responsible for obtaining the financial commitments for CTA. It was Preston who was "in charge" of the preparation of the CTA application, and it was he who was contacted by Price whenever there were any questions concerning this application. Preston "loaned" money to CTA and paid its bills without consulting the general partner, and it was he who terminated CTA's arrangement with Sterling and threatened Sterling with a possible lawsuit. Preston had control of the financial affairs of CTA to the extent it was he who had custody and control of the partnership's checkbook and records. Only he or his secretary were authorized to write checks. He was the only partner who advanced funds to CTA when needed after the initial contributions of the partners had been exhausted. The findings

establish that Preston actively conducted the affairs of the CTA partnership, exercised decision-making authority on its behalf and acted as a *de facto* general partner.

6. Adam, the titular general partner, was a long-time friend and business associate of Preston who became interested in CTA at Preston's urging. Adam, who, as the general partner, bore the responsibility for managing the partnership, was only too glad to have Preston perform these duties in his stead. The CTA partnership agreement specified that Adam was to have exclusive control of the business and affairs of the partnership and that the limited partners were not to take part in the management of the partnership or to act on its behalf or to bind the partnership. Yet, as noted, *supra*, it was Preston who made the arrangements with Sterling for the preparation of the application and arranged the equipment leasing proposal and the bank loan. Preston held himself out as the managing partner of CTA in correspondence to CTA's counsel and also in a letter to Price of Sterling. This characterization by Preston accurately reflected the role that he played in the CTA partnership. Rather than being a passive investor, Preston was the partner who managed the affairs of the partnership. Adam's acceptance of Preston's role in CTA and his reliance and dependence on Preston to carry out these functions clearly establish that Preston was a real party in interest in CTA and that the creation of the limited partnership was a sham and subterfuge conceived in order to earn CTA a comparative advantage by having Adam as the only general partner and the proposed General Manager of the station in order to merit a comparative preference relative to integration of ownership and management. It is ruled that Preston was the moving and controlling force with respect to the formation of CTA and the prosecution of its application before this Commission.

7. Turning to the question as to whether Preston, in fact, withdrew as a partner in CTA in July 1983, as represented to the Commission in the July 5, 1983 amendment, it is found that he continued his role in CTA and that his proposed withdrawal was another instance of subterfuge practiced upon this Commission. Stated simply, the purported transfer of Preston's interest in CTA to Frey was nothing more than a sham. CTA would have this Commission believe that Preston, a sophisticated businessman and investor, and Frey, a certified public accountant and experienced businessman, agreed that Preston's interest in CTA would be transferred to Frey without any discussion as to the particulars of such a transfer. Frey purportedly agreed to be

substituted for Preston in the CTA partnership in a five-minute telephone conversation during which he was not informed as to the terms of the agreement and was not told what partnership interest he was receiving, what the purchase price was, what his rights or responsibilities were to CTA, or what the existing liabilities of CTA were.

8. CTA never took the necessary steps to substitute Frey for Preston as a limited partner. CTA's Certificate of Limited Partnership was never amended to delete Preston's name and substitute Frey's.[75] It is concluded that this failure was not inadvertent. Preston and the other partners were sophisticated businessmen. Adam's explanation that he never got around to amending the certificate is not persuasive.

9. Frey never signed a partnership agreement; never learned anything about the partnership's business; was unaware of its liabilities; was not consulted as to the dismissal of the application; and was completely oblivious to what was going on concerning CTA after he purportedly acquired his interest.

10. Preston's active involvement in CTA affairs continued after his purported withdrawal in July 1983. He continued to control CTA's finances. He and his secretary remained the only individuals authorized to sign checks on the CTA account for seven months. This arrangement was discontinued only when questions were raised before this Commission as to Preston's continued role in CTA. Preston continued to "loan" money to CTA and was the partnership's sole source of funds. He arranged a transfer of $100 from the account of another applicant, Portland Television Associates, Ltd. (PTA), to CTA in September 1983, and "loaned" $5,000 to CTA in February 1984 so that CTA would have funds to pay its legal fees. No note was ever executed evidencing this "loan" and there was never any discussion as to the repayment terms. It was Preston who terminated CTA's relationship with Sterling in September 1983 and who signed the CTA check making payment on the outstanding balance to Sterling.[76] Preston signed his letter to Sterling terminating its relationship with CTA as "Partner."

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[75] The Tennessee Uniform Limited Partnership Act (Tenn. Code Ann. §§ 61-2-101, *et seq.*) provides that the assignee of a limited partnership interest becomes a substituted limited partner only after the Certificate of Limited Partnership is amended (Tenn. Code Ann. § 61-2-119(e)). Such amendment is effectuated by all the partners, including the departing and substituting limited partner, signing a new certificate and its being filed with the county clerk where the certificate was first recorded (§§ 61-2-125(a)(2) and 61-2-125(e)).

[76] He borrowed $100 from PTA, an applicant for a television station in Portland, Oregon, for this purpose.

This was on a CTA letterhead. At that time, he threatened legal action against Sterling because it filed a television application in the Caldwall-Boise market for another channel. Adam had not authorized Preston to take these actions. Preston's continued exercise of control over the affairs of CTA after July 1983 is further evidenced by the fact that Adam, the general partner, consulted wtih Preston when he, Adam, decided to withdraw from CTA and in connection with the dismissal of CTA's application. Frey, on the other hand, was not even informed that a settlement had been reached looking to the dismissal of the CTA application. It is ruled, for the reasons detailed, *supra*, that this so-called transfer of a partnership interest was a fraud on this Commission and that Preston continued as the real party in interest in CTA.

11. Turning to the question as to whether CTA misrepresented facts or was lacking in candor concerning its ownership and its partners' intentions relative to such ownership, it is important to note that the Commission has, on numerous occasions, stressed that applicants for broadcast facilities must comply with high standards of truthfulness and candor. The Court of Appeals has recognized that this Commission must rely heavily upon the completeness and accuracy of the submissions made to it and that applicants have an affirmative duty to inform the Commission of the facts the Commission needs to know in order to fulfill its statutory mandate. *RKO General, Inc. v. F.C.C.*, 670 F.2d 215, 232 (D.C. Cir. 1981). The Commission has had occasion to clarify the distinctions between misrepresentation and lack of candor and has stressed that misrepresentation involves false statements of fact, while lack of candor involves concealment, evasion and other failures to be fully informative. However, the Commission has correctly noted that both misrepresentation and lack of candor represent deceit and that they differ only in form. *Fox River Broadcasting, Inc.*, 93 FCC 2d 127, 129, 53 RR 2d 44, 46 (1983).

12. The record establishes that Preston misrepresented facts and concealed material information from this Commission about his role in CTA in an attempt to conceal from both this agency and the competing applicant in the Caldwell, Idaho proceeding that he was, in fact, the moving force and the controlling partner in the CTA application. The record further establishes that Preston continued his role in CTA after it was represented to this Commission that he had withdrawn and that Frey had been substituted in his place.

13. As noted, *supra*, it was Preston who terminated Sterling's relationship with CTA, and it was he who threatened Sterling with a possible lawsuit in the dispute between CTA and Sterling relative to Sterling's filing of a television application for the Caldwell-Boise market. Additionally, it was Preston who financed the activities of CTA by his "loans." These activities all took place after he purportedly had withdrawn from the partnership. It is important to note that CTA failed to disclose, at the time of the filing of its application in February 1982, that Preston, a limited partner, and not Adam, the general partner, was controlling and conducting the affairs of the partnership. Thus, there was misrepresentation in the application as originally filed relative to who the actual managing partner was, and there was continuing misrepresentation in the filing of the amendment which purportedly withdrew Preston as a partner in CTA. The reasons for these repeated misrepresentations are evident. CTA wished the Commission and its competitor to believe that Adam, who was to be fully integrated into the proposed station's operations and who was a native of the State of Washington, would, as general partner, conduct the business of the partnership and manage the station, resulting in CTA being accorded an integration preference. The reason for representing that Preston had withdrawn was in order to eliminate a possible diversification demerit against CTA because of Preston's other broadcast interests.

14. Preston, in support of CTA's opposition to the petition to enlarge issues to inquire into Preston's role in the affairs of CTA, represented that he had not had the authority to act for CTA and that he had no intention of remaining a partner subsequent to July 5, 1983. This representation was false, as was Preston's claim that Adam had authorized him to open the CTA checking account. As the findings establish, the checking account was opened at Preston's direction by his secretary before Adam agreed to be a CTA partner. The contention that Price's testimony was "fueled" by animosity towards Preston is not supported by the record. Price freely acknowledged that there was "some level of animosity" between Sterling and Media Central and that Sterling no longer has any "business dealings" with Kent or Media Central. While there was a "falling out" between Sterling and Kent (Tr. 568-69), the totality of the record evidence discloses that Price's testimony can be given reliance. The Presiding Judge observed Price and is convinced that he was making a sincere effort to be truthful and candid with respect to

his and Sterling's role in the preparation of the CTA application and that his disclosures as to Preston's role are both truthful and accurate. Preston's behavior as a witness was different; he made every effort, by giving general and obtuse answers to questions, to minimize and distort his actual role in the preparation and prosecution of the CTA application. The hearing was an opportunity for Preston to make full disclosure of his role and the role of Media Central in the formation and prosecution of the CTA proposal, among others.[77] However, Preston's demeanor, as noted, *supra*, was that of an individual who was either unable or unwilling to acknowledge that he was the moving force and the real party in interest behind the CTA propsoal. His characterization of the many functions he performed for CTA as "minute" (par. 131, *supra*) was a blatant misrepresentation.

15. With respect to Preston's purposted withdrawal as a partner in CTA, it is ruled that it is not plausible that Preston and Frey, experienced businessmen, would enter into an "unconditional agreement" during a five-minute telephone conversation to purchase an unspecified limited partnership interest on unspecified terms. It is ruled that this was not a *bona fide* transaction and that the representation to this Commission that it was constituted deliberate misrepresentation.

16. It is ruled that CTA is guilty of deliberate and intentional misrepresentation to this Commission as to its true ownership and control, and it is further ruled that the applicant for the Bellingham facility, which is the subject of this proceeding; namely, BTA, in which Preston has an ownership interest, is found to be disqualified as a prospective broadcast licensee. The Review Board, noting that the Commission's scheme of regulation is premised on its ability to depend on the accuracy and truthfulness of licensees' representations, has stressed that disqualification is warranted when there is misrepresentation to this Commission by a principal of the applicant. *Country Broadcasting Company*, 93 FCC 2d 83, 53 RR 2d 293 (Rev. Bd. 1983). At a minimum, a substantial and decisive comparative demerit should be assessed against BTA as reflecting the Commission's concern about the misconduct of Preston. *Focus Television Co.*, 98 FCC 2d 546, 552–53, 56 RR 2d 1335, 1340 (Rev. Bd. 1984).

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[77] Preston never explained why he provided Kent, the president and majority stockholder of Media Central, with periodic updates on the status of the CTA application.

17. While it has been concluded that BTA is disqualified from being awarded the consturction permit for a new television station to operate in Bellingham, Washington, it is appropriate to consider and evaluate the comparative posture of the two mutually exclusive applicants for the Bellingham facility in the event that reviewing authority finds that disqualification is not warranted by the facts of this case. Initially, it is ruled that the substantial and decisive comparative demerit which must be assessed against BTA because of the deliberate and intentional misrepresentations to the Commission by Preston[78] offsets any possible comparative preferences that might be awarded to BTA and mandates the grant of the Prism application on a comparative basis.

18. BTA comes before this Commission as a limited partnership composed of Campbell, Brooks, Dye and Preston as limited partners and Ms. Tuerk as the only general partner. Each partner holds a 20 percent equity interest in BTA. BTA's contention that the record developed in this proceeding confirms and supports Ms. Tuerk's "control over the affairs of the partnerhship, and her plans for management of the facility" is rejected. The findings detailed, *supra*, establish that the purported BTA limited partnership cannot be given credence, since it was structured to garner integration credit for Ms. Tuerk, a female and, purportedly, the only general partner. The parallel conduct of Preston in initiating and coordinating the filing of both the CTA application for Caldwell and the BTA application for Bellingham is detailed in the findings. Preston actively conducted the affairs of both these partnerships, exercised decision-making authority on their behalf and acted as a *de facto* general partner. It was Preston, in both cases, who originated the idea of filing the applications, and it was he who interested the other partners in the venture. The June 26, 1981 Price letter to Preston and the December 29, 1981 Preston letter to Price related to both the preparation of the BTA and CTA applications and the deposits to Sterling for its services in preparing such applications. Price's testimony made clear that Preston was the controlling force behind the BTA application. It is ruled that Preston has been the prime mover behind the BTA application and has acted as a *de facto* general partner in

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[78] Adam, CTA's general partner, and Campbell and Brooks, its limited partners, were aware that Preston was holding himself out as "Managing Partner" of CTA. They received copies of Preston's September 23, 1982 letters to CTA counsel and Price of Sterling signed by Preston as "Managing Partner." Campbell and Brooks are limited partners in the BTA applicant.

contravention of the BTA Limited Partnership Agreement. It was he who contacted and contracted with Sterling for the preparation of the application; all correspondence from Sterling was addressed and sent to Preston; Preston designated Ms. Tuerk as the local contact and later as the General Manager; and Preston fully controlled the checking account of BTA. Preston was the partner who managed the affairs of the BTA partnership, as he did with the CTA proposal.

19. Significantly, the Limited Partnership Act (Washington Revised Code) provides for limited liability for limited partners, both towards the partnership's creditors and the partnership itself. In fact, the purported reason for creation of limited partnerships is to protect such limited partners from general liability. Such limited partners are only liable to the partnership for their stated contributions.[79] However, Ms. Tuerk, the general partner, has been assured that she would not be solely responsible for all of the partnership's obligations and liabilities. It is ruled that the BTA purported limited partnership is not to be given credence, and the claim of BTA for 100 percent integration by its female general partner is rejected. At most, BTA would be entitled to 20 percent integration; namely, the interest of Ms. Tuerk in the partnership. However, even crediting BTA with 20 percent integration is not warranted by the facts of this case. Credence cannot be given to her promise to participate actively in the day-to-day operation of the station in view of the fact that it is clear that she was chosen as the general partner to enhance BTA's comparative posture and to shield BTA from suffering a comparative diversification demerit because of Preston's other media interests and in view of the fact that she abdicated her responsibilities as general partner to Preston with respect to this proposal.

20. Turning to the question of diversification, it is ruled that Preston's ownership interst in and directorship of Media Central, which has ownership interest in five television stations in Missouri, Ohio, Alabama and Hawaii and meaningful management functions in five other stations throughout the country, requires awarding a slight to moderate preference to Prism. The various media interest of the Prism principals, as detailed in the findings, do not impact as adversely on this factor as do the Media Central holdings.

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[79] Wash. Rev. Code Ann. § 25.08.170.

21. In summarizing the comparative posture of the applicants, it is ruled that neither applicant is awarded any preference with respect to integration of ownership and management and that, at most, a slight to moderate preference is awarded to Prism relative to the diversification of the media of mass communications.

Accordingly, IT IS ORDERED that, unless an appeal from this Initial Decision is taken by a party or the Commission reviews the Initial Decision on its own motion, in accordance with section 1.276(d) of the Rules, 47 C.F.R. 1.276(d),[80] the application of Prism Broadcasting Corporation for a construction permit for a new television station to operate on Channel 64 at Bellingham, Washington IS GRANTED and the application of Belligham Television Associates, Ltd. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
THOMAS B. FITZPATRICK, *Chief Administrative Law Judge*

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[80] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release, pursuant to 47 C.F.R. 1.276(d).

**Cellular Communications Systems**
**Comparative Criteria**
**Comparative Hearing**
**Domestic Public Cellular Telecommunications Service**

**Initial Decision granting nonwireline cellular application to Automatic Wide-Area Cellular Systems, Inc. (AWACS) affirmed with modifications. Commission found AWACS entitled to moderate preferences for its assessment of relative demand for service and for its ability to accommodate local demand, and to a slight preference for its expansion plan. These outweighed slight preferences awarded to Cellular Mobile Systems of Pennsylvania (CMS) for coverage of geographic area and population and for its proposed rate structure and slight preferences awarded to MCI Cellular Telephone Company (MCI) for its assessment of relative demand and for its proposed service offerings. Commission also affirmed the Common Carrier Bureau's denial of a proposed partial settlement between CMS and MCI and disposed of other procedural matters.**
**— *Celcom Communications Corp.***
**CC Docket No. 83-25**

**FCC 84-649**

## BEFORE THE
# FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

| | |
|---|---|
| In re Applications of | CC Docket<br>No. 83-25 |
| CELCOM COMMUNICATIONS<br>CORPORATION OF PENNSYLVANIA | File No.<br>26164-CL-P-(16)-82 |
| AUTOMATIC WIDE-AREA CELLULAR<br>SYSTEMS, INC. | File No.<br>26084-CL-P-(18)-82 |
| CELLULAR MOBILE SYSTEMS OF<br>PENNSYLVANIA | File No.<br>26188-CL-P-(16)-82 |

| | |
|---|---|
| MCI CELLULAR TELEPHONE COMPANY | File No. 26113-CL-P-(13)-82 |
| For a construction permit to establish a new cellular system operating on frequency block A in the Domestic Public Cellular Radio Telecommunications Service to serve the Philadelphia, Pennsylvania Standard Metropolitan Statistical Area | |

### *Appearances*

*Curtis T. White, Mary E. Brooner* and *Edward Hayes, Jr.*, on behalf of Unity Telecommunications Systems, Inc.; *S. William Livingston, Jr., Alan A. Pemberton, Thomas William Mayo* and *Jonathan D. Blake* on behalf of Celcom Communications Corporation of Pennsylvania; *Lawrence M. Miller* and *Michael T. Volkov* on behalf of Automatic Wide-Area Cellular Systems, Inc.; *Edward P. Taptich, Charles C. Hunter, Laura Mow, Lawrence Movshin* and *Jean Kiddoo* on behalf of Cellular Mobile Systems of Pennsylvania; *John M. Pelkey, Melodie A. Virtue, William J. Potts, Jr.*, and *Gary M. Fereno* on behalf of MCI Cellular Telephone Company; and *James O. Juntilla, Robert W. Spangler, Jerry M. Hermele*, and *Frederick F. Fitzgerald* on behalf of the Chief, Common Carrier Bureau, Federal Communications Commission.

## *Final Decision*

Adopted December 31, 1984; Released January 8, 1985

BY THE COMMISSION: COMMISSIONERS DAWSON AND PATRICK CONCURRING IN THE RESULT.

### *Background*

1. In this proceeding, the captioned applicants have filed exceptions to the Initial Decision of Administrative Law Judge Joseph Chachkin granting the application of Automatic Wide-Area Cellular Systems, Inc. (AWACS) in the Philadelphia nonwireline cellular proceeding. *Celcom Communications Corpora-*

*tion of Pennsylvania*, FCC 83D-25, released September 16, 1983. Judge Chachkin found AWACS' application to be comparatively superior to those of the other mutually exclusive applicants under two of the three issues designated for hearing and concluded that grant of AWACS' application would better serve the public interest, convenience and necessity. Celcom Communications Corporation of Pennsylvania (Celcom), Cellular Mobile Systems of Pennsylvania (CMS) and MCI Cellular Telephone Company (MCI) have filed exceptions to the Initial Decision (I.D.). For the reasons stated below, we affirm the *I.D.* with modifications, and we affirm the grant of AWACS' application. Except as otherwise noted, the Findings of Fact and Conclusions of Law of the *I.D.* are incorporated by reference.

2. On January 27, 1983, the Chief, Common Carrier Bureau designated the captioned applications (and that of Unity Telecommunications Systems, Inc.) for hearing on the following issues:[1]

> (a) To determine on a comparative basis the geographic area and population that each applicant proposes to serve; to determine and compare the relative demand for the services proposed in said areas; and to determine and compare the ability of each applicant's cellular system to accommodate the anticipated demand for both local and roamer service;
>
> (b) To determine on a comparative basis each applicant's proposal for expanding its system capacity in a coordinated manner within its proposed Cellular Geographic Service Area (CGSA) in order to meet anticipated increasing demand for local and roamer service;
>
> (c) To determine on a comparative basis the nature and extent of the service proposed by each applicant, including each applicant's proposed rates, charges, maintenance, personnel, practices, classifications, regulations and facilities (including switching capabilities); and
>
> (d) To determine, in light of the evidence adduced under the foregoing issues, what disposition of the referenced applications would best serve the public interest, convenience and necessity.

The Separated Trial Staff of the Common Carrier Bureau (STS) was also made a party to the proceeding.

3. Pursuant to the special expedited procedures for cellular applications in the top 30 markets,[2] the applicants filed their

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[1] Advanced Mobile Phone Service, Inc. (Philadelphia Designation Order), 52 RR 2d 1593 (Com. Car. Bur. 1983). In this order, financial qualifications and site availability issues were designated against Unity. As a result of a merger between CMS and Unity, the Unity application was dismissed and original issues (a) and (b) involving Unity's application only rendered moot. For the purposes of clarity and consistency with our other cellular decisions, we have redesignated the remaining issues (a) through (d).

[2] Cellular Communications Systems (Cellular Reconsideration Order), 89 FCC 2d

written direct cases with their applications on June 7, 1982. Rebuttal testimony was filed on March 16, 1983. The first hearing was held on April 27, 1983 at which time the Judge ruled on the admissibility of direct and rebuttal exhibits and directed that surrebuttal and other additional materials be filed on May 4. A second hearing session was held on May 12 for the cross-examination of Celcom witness Paul L. Coppage; on May 13 a final hearing was held to dispose of further evidentiary matters and the record was closed. Proposed Findings of Fact and Conclusions of Law were filed on June 13, 1983; Reply Findings were filed ten days later.

4. In the *I.D.*, the judge awarded CMS a slight preference under Issue (a) for its proposed geographic area and population coverage.[3] He awarded AWACS a substantial comparative preference for its assessment of relative demand and a moderate preference for its ability to accommodate demand for local service. CMS and MCI each received a slight preference for ability to accommodate roamers. Based on the individual preferences, AWACS received a moderate preference under Issue (a) as a whole. AWACS also received a moderate preference under Issue (b) for its system expansion proposal. Under Issue (c), MCI was awarded a slight preference for its proposed service offerings, CMS a slight preference for its proposed rate structure, and AWACS a slight preference for its maintenance plans. The judge found that the preferences awarded AWACS outweighed the other preferences, and accordingly, found AWACS' proposal superior to those of the other applicants.

5. On November 14, 1983, Celcom, CMS and MCI filed their exceptions to the *I.D.* All four applicants and the STS filed reply exceptions on December 6, 1983.[4]

### *Issue (a)*

6. Issue (a) calls for a comparison of the geographic area and population the applicants propose to serve, the relative demand for service and the applicants' ability to accommodate demand for

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58, 87-91 (1982). *See also* 47 C.F.R. § 22.916(b)(1).

[3] We use the terms "slight," "moderate" and "substantial" to describe the preferences awarded to the applicants. A "moderate preference" is identical to a "preference," and receives the same comparative credit.

[4] In addition, the parties have filed numerous additional motions since that time on a variety of procedural and substantive matters including an Application for Review of the Bureau's denial of a proposed partial settlement between CMS and MCI. These matters are discussed in paras. 42-50, *infra*.

both local and roamer service.[5] *See Rogers Radiocall, Inc. (Chicago Final Decision)*, 55 RR 2d 1261 (1984), at para. 8, *recon. denied, Chicago Reconsideration Order*, 56 RR 2d 951 (1984), *appeal pending, Cellular Mobile Systems of Illinois, Inc. v. FCC*, No. 84-1456 (D.C. Cir. filed September 4, 1984); *MCI Cellular Telephone Company (Pittsburgh Final Decision)*, 55 RR 2d 1215 (1984) at para. 9, *recon. denied, Pittsburgh Reconsideration Order*, 56 RR 2d 936 (1984), *appeal pending, Cellular Mobile Systems of Pennsylvania, Inc. v. FCC*, No. 84-1131 (D.C. Cir. April 5, 1984).

7. *Geographic Area and Population.* The judge found that the Philadelphia MSA encompasses 3,532 square miles in Bucks, Chester, Delaware, Montgomery and Philadelphia counties, Pennsylvania; and Burlington, Camden and Gloucester counties, New Jersey. The MSA's 1980 census population is 4,716,818. The following table presents the judge's findings as to the area and population proposed to be served by each applicant.

| | *Geographic Area Served*[6] | | *Population* | |
|---|---|---|---|---|
| | *Total* | *Percentage of MSA* | *Total* | *Percentage of MSA* |
| AWACS | 2,930 | 82.9% | 4,532,000 | 96.1% |
| Celcom | 2,813 | 79.6% | 4,522,583 | 95.9% |
| CMS | 2,741 | 77.6% | 4,580,625 | 97.1% |
| MCI | 2,708 | 76.7% | 4,493,973 | 95.0% |

*I.D.*, para. 7.

8. The judge found that all four applicants propose service to the bulk of the Philadelphia MSA, including most major population, employment and traffic corridors and at least 95% of the area's population. *I.D.*, para. 71. He found, however, that CMS deserved a slight preference for its area and population coverage because even though AWACS would serve 189 more square miles than CMS, CMS would serve 48,000 more persons. Moreover, the judge found CMS' proposed highway coverage superior to AWACS' and MCI's (and equal to that proposed by Celcom) and that its areas of exclusive coverage contain 81,000 more persons,

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[5] In Cellular Communications Systems, 86 FCC 2d 469, 502 (1981), we stated that the geographic area that an applicant proposed to serve would be a major basis of comparison. We also noted that "the presence of densely populated regions, highways, and areas likely to have high mobile usage characteristics as well as indications of a substantial public need, including the results of public need surveys" would be significant factors to consider.

[6] For purposes of comparison, the geographic area served is that area within the applicant's composite 39 dBu contours within the MSA. The percentages given are of the total area and population of the Philadelphia MSA.

954 more businesses, 5,416 more employers, 3129 additional households with income over $50,000 and would generate 32 more users than the "pockets" of coverage served by AWACS and not by CMS. *I.D.*, para. 9.[7]

9. Celcom, CMS and MCI except to the judge's findings on this sub-issue.[8] Celcom asserts that CMS should not be the preferred applicant because intra-system interference would reduce the effective coverage of CMS' proposed system below that of the other applicants and that it would offer the best coverage relative to AWACS and MCI.[9] MCI objects to the overall methodology adopted by the judge for evaluating relative highway coverage[10] and asserts that he erred by incorrectly evaluating its proposed highway coverage.[11] In addition, CMS seeks a substantial, rather than a slight, preference for its area and population coverage asserting that it proposed a more efficient and better tailored system and because AWACS' greater geographic coverage results from unnecessary coverage of the southeastern section of the MSA consisting primarily of permanent open space and very sparse population.

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[7] The judge found AWACS' pocket coverage superior to that proposed by MCI or Celcom.

[8] AWACS did not except to the judge's award of a slight preference to CMS for its coverage proposal.

[9] For the most part, Celcom's exceptions concentrate on whether it should be preferred over AWACS on this issue and not whether CMS was properly awarded a slight preference. Similarly, MCI's exceptions concentrate on whether its coverage proposal should be preferred over those of AWACS and Celcom. Since we are awarding CMS a slight preference, it is not necessary to rank the remaining proposals for less than a slight preference or address arguments directed at the other applications.

[10] The judge multiplied the annual average daily traffic (AADT) for each highway segment that an applicant failed to cover by the number of miles of that highway outside the applicant's 39 dBu contours to determine its missed traffic volume. MCI argues that this ignores "temporal" factors such as speed limits, as well as actual speeds at different times of day, and thus does not accurately reflect whether a coverage gap would really result in no service or merely a short interruption or delay in completing a call. We have reviewed the applicants' relative highway coverages and find that, in most cases, they differ by only a few miles on fringe highway segments. *I.D.*, note 17. Since, as MCI suggests, these differences may not represent significant differences in actual reliable service, we have accorded the judge's highway analysis limited comparative weight.

[11] MCI asserts that the judge incorrectly used a map that did not use the standard 100 foot minimum elevation for determining 39 dBu coverage, and thus compared the highway coverage of MCI and the other three applicants on an unequal basis. However, even if we accept MCI's revised highway coverages, it would not change our conclusions on this sub-issue given the greater area and population coverage of CMS as well as its superior "pocket coverage."

10. We find no basis in these exceptions for overturning the judge's award of a slight preference to CMS for area and population coverage. CMS has proposed coverage of more of the total population of the MSA than the other applicants and, along with Celcom, proposed the best coverage of major highways. Moreover, its areas of exclusive coverage reflect higher indicia of cellular demand than the exclusive areas of the other applicants. In addition, we reject Celcom's argument that the coverage of CMS' system will be reduced as a result of intra-system interference. CMS admits the existence of intra-system interference between certain cells in its first year system, but asserts that its overlapping cell structure is designed to prevent any loss of coverage because an interference-free channel will be available from one of a number of overlapping cells. CMS Surrebuttal Exhibit, pp. 3-7, 21-22; CMS Reply to Exceptions, pp. 4-5. Celcom's argument is merely speculative and it has not rebutted CMS' explanation.[12]

11. We decline to expand CMS' slight preference absent some showing that the judge's decision is unreasonable. The judge awarded a slight, rather than a moderate preference, because all applicants propose to serve the bulk of the Philadelphia market. CMS has not demonstrated that this conclusion was in error. *See American Mobile Communications of Washington and Oregon* (Portland Final Decision), FCC 84-371, released August 24, 1984, at para. 15.

12. We also decline to give CMS credit for its depth of coverage design. This matter has been dealt with in the *Chicago Final Decision* where we declined to give CMS credit on this issue because CMS failed to demonstrate that service to portables would be impaired in the absence of overlapping cells.[13] CMS has also failed to meet this burden here.[14]

### *Relative Demand for Service*

13. All of the applicants for the Philadelphia nonwireline license conducted demand studies in an effort to determine the level of demand, how demand is distributed around the MSA, and how

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[12] Considerations involving intra-system interference are discussed further in n.22 and para. 29, *infra*.

[13] Chicago Final Decision, *supra*, at para. 14; Pittsburgh Final Decision, *supra*, at para. 42. Accordingly, we do not affirm the judge's conclusions on this matter to the extent inconsistent with our Chicago and Pittsburgh holdings.

[14] Even assuming, *arguendo*, that overlapping design is necessary, the other Philadelphia applications also have a high degree of overlap. *See* I.D., para. 10.

demand will change over time. All four applicants forecast the levels of demand they expect to serve as set forth below:

| *Year of Operation* | *Celcom* | *AWACS* | *CMS* | *MCI* |
|---|---|---|---|---|
| 1 | 1,300 | 8,681 | 4,254 | 3,000 |
| 2 | 4,100 | 10,471 | 9,919 | 6,300 |
| 3 | 7,690 | 13,869 | 16,999 | 10,000 |
| 4 | 11,900 | 18,563 | 22,655 | 14,600 |
| 5 | None | 22,999[15] | 28,302 | 19,700 |

*I.D.* para. 12.

14. The judge found that AWACS should receive a substantial preference for its determination of relative demand for cellular service in the Philadelphia MSA. He found AWACS' market analysis more reliable than those of the other applicants and that AWACS used this information in designing a demand-based cellular system. AWACS conducted three surveys of the Philadelphia MSA encompassing both business and residential users soliciting responses regarding various rate levels at which respondents would purchase service, types of service desired and areas of high interest in cellular service. *I.D.*, para. 73. In addition, it developed demographic data unique to the Philadelphia market and was the only applicant to identify probable demand on a census tract basis. *Id.* AWACS described in detail the methodology and assumptions by which it forecast yearly demand and, the judge found its assumptions to be reasonable. In contrast, the judge found Celcom's public need showing patently defective and its overall market study so inadequate as not to warrant comparative consideration. *I.D.*, para. 74. As to CMS, the judge criticized its failure to establish a nexus between the results of its market studies and its projection of demand and distribution of demand within the MSA. He also found that its research rested on certain dubious assumptions which prejudiced its determination of the nature of the Philadelphia cellular market; e.g., that paging is a precursor of cellular radio, and that there is a consistency of demand for cellular radio among markets.[16] *I.D.*, para. 75. Finally, the judge criticized MCI's demand showing for failing to ascertain whether respondents were authorized to indicate their firm's willingness to purchase cellular service and

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[15] AWACS also provided a forecast of demand for years 6–11 of operation.

[16] The latter proposition was explicitly stated in the Claritas study in which no Philadelphia MSA businesses were surveyed and implicitly in the Westat Report where data for all top-30 MSAs were combined. Thus, the judge concluded that there was serious doubt as to whether CMS' demand projections are based on an in-depth analysis of the Philadelphia market.

for failing to distribute demand within the MSA. *I.D.*, para. 76.

15. Celcom, CMS and MCI each except to the judge's "point-by-point" criticisms of their respective forecasting techniques. Celcom submits that accurate forecasts are impossible and irrelevant for comparative purposes. CMS argues that it should be preferred because its estimate of demand is higher than AWACS' and because it demonstrated a nexus between its market research and forecasts. CMS and MCI argue that AWACS' forecasts are seriously flawed, pointing to several unsubstantiated assumptions and unexplained inconsistencies in AWACS' relative demand study.[17] Finally, CMS contends that MCI did not establish a nexus between its market research and the subscriber forecast.

16. After carefully reviewing the record in this proceeding, as well as the decisions in our previous comparative cellular proceedings, we conclude that the Judge's conclusions with respect to relative demand should be modified. We will award AWACS a moderate preference, rather than a substantial one, and MCI will receive a slight preference, rather than no preference. Overall, AWACS employed the most reasonable assumptions and could best be relied upon for designing a cellular system responsive to the particular needs of the Philadelphia market. Among the four applicants, AWACS performed the most reliable and market specific assessment of demand. Its survey was more detailed and comprehensive. Most important, its distribution model used census tract data to identify the areas where demand would develop. None of the other applicants attempted to ascertain and localize the demand in this manner. *See Chicago Final Decision, supra*, at paras. 22–25. However, we are reducing the substantial preference, which the judge awarded, to a moderate preference because, as the parties point out, its research includes a number of questionable assumptions and its forecasting techniques, while superior to those of the other applicants, are still flawed in some respects. *See* note 17, *supra*. Notwithstanding these criticisms, however, AWACS performed the most market-specific, detailed and well-substantiated assessment of demand in the Philadelphia market. In addition, we find that MCI's surveys are preferable to those of Celcom and CMS because MCI provided more extensive analysis of the market and explained its assumptions in more

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[17] For example, MCI argues that AWACS erroneously restricted residential users from its survey universe, failed to disclose the "response rate" to its survey, and excluded many potential users because it based its sample group from the Yellow Pages. CMS argues that the cost disclosed to potential subscribers was inconsistent with AWACS' proposed schedule of charges, and that AWACS' distribution methodology was subjective.

detail. The judge's major criticism of MCI's study is MCI's failure to detail how it converted its estimate of total realizable demand to its five-year demand protection. While it is true that MCI did not provide extensive details to explain its computations, it did give a general explanation about the factors it used to formulate its projection.[18] *See Portland Final Decision, supra*, at para. 36. Most important, when MCI, Celcom and CMS are compared with each other as a whole, we conclude that MCI's study is the more reliable and deserving of a slight preference. *See Pittsburgh Final Decision, supra*, at paras. 21–22.

17. In contrast, the judge found, and we agree, that Celcom's public need showing is patently defective. Celcom's own market research played no part at its determination of projected demand in Philadelphia and, by the applicant's own admission, was not intended to be statistically valid. *See I.D.*, para. 74. Celcom has not rebutted these conclusions.[19] As to CMS, its exceptions to the judge's findings are identical to the exceptions it raised in the *Chicago* and *Pittsburgh* proceedings, as well as in the *Portland* proceeding. We find the resolution of the issues there to be dispositive, and in agreement with the judge's analysis of flaws based on the record developed here. Accordingly, we find no basis to reverse the judge's conclusion that CMS is not entitled to a preference for its demand assessment.

### *Ability to Accommodate Local Demand*

18. The judge awarded AWACS a moderate preference for its ability to accommodate local demand. He found that AWACS designed its system based on its superior public need showing and utilized its market research for determining the initial placement of cell sites, overall system capacity, initial channel requirements and expansion plans. *I.D.*, paras. 30, 77. As a result, AWACS' 39 dBu contours cover most of the area within the MSA defined as having a high potential for cellular usage in AWACS' market studies. The judge concluded that no other applicant conducted as

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[18] However, because AWACS' study is not subject to this criticism and because AWACS provided a more reliable demand distribution, we are awarding AWACS a greater preference than MCI.

[19] There is no merit to Celcom's claim that demand forecasts should not be compared because each applicant will face the same public need. This ignores our basic objective that applicants identify the nature of demand in each market as a basis for designing a cellular system. Celcom's arguments are merely an attempt to redirect the comparative analysis away from a comparison of demand studies. We affirm the judge's conclusion that it failed to provide a sufficient basis for its demand estimates to make them credible.

in-depth and detailed an analysis integrally relating technical design to demographics in the design of its cellular system. *I.D.*, para. 77.

19. In contrast, the judge found the ability of Celcom's system to accommodate projected first-year demand essentially unverifiable since the applicant provided no details as to the capacity and configuration of its system prior to completion of construction in the fourth-year of phased-in operation.[20] Moreover, even fully constructed, the system would have capacity for only 11,700 subscribers, short of its projected demand of 11,900 subscribers. As to CMS, the judge found its system design based on a rigid semi-uniform distribution methodology for localizing demand and assigning channels resulting in an inflexible allocation of demand that fails to incorporate variances in subscriber usage projections.[21] *I.D.,* para 79. Thus, CMS did not use its market surveys to determine where prospective Philadelphia cellular users would be located and design its system accordingly. The judge also found MCI's ability to accommodate initial local demand inferior to that demonstrated by AWACS because its contours exhibit intercell gaps and other limitations unexplained by its market research. *I.D.,* para. 80. The judge also found that MCI did not indicate how its public need showing related to a specific user distribution for the Philadelphia area or how it assigned channels to individual cells.[22]

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[20] Celcom proposes to begin operation as soon as its central switch and first cell are ready and to phase-in operations over a three-year period at which time its proposed 16-cell system could be complete. Since Celcom's proposed *complete* system will not commence operation until after a 36-month construction period, the judge compared the other applicants' first year systems to Celcom's fourth year of phased-in service.

[21] The judge concludes that this would preclude CMS from achieving its target system-wide grade of service.

[22] The judge also found that AWACS' initial system would experience no co-channel interference and insignificant adjacent-channel interference while each of the other applicants would experience significant intra-system interference problems. Celcom, CMS and MCI except to these findings. We accord no weight to these findings since the possibility of intra-system interference is not a decisional criteria. We have consistently held that some level of interference is expected in a maturing cellular system and that it can be managed effectively since all of the potentially interfering transmitters are under the control of the same carrier. Chicago Final Decision, *supra,* at para. 40; Pittsburgh Final Decision, *supra* at para. 41–43. We emphasize that AWACS' preference is not based on the possibility of interference in the other systems. MCI also faults AWACS' cell configuration for failure to follow an idealized grid. We reject this argument. We have repeatedly indicated that there is no design concept preference for uniform cell placement. See Pittsburgh Final Decision, *supra,* at para. 40; Chicago Final Decision, *supra,* at para. 41.

20. Celcom excepts to the judge's findings on this sub-issue arguing that it would provide equivalent or better coverage than the other applicants with more widely-spaced and therefore less expensive cell sites. It contends that this approach is more likely to be interference-free, facilitate frequency reuse, enable easier relocation of cell sites and more flexibly accommodate changing demand. It also seeks credit for proposing to implement service more quickly than the other applicants. CMS also reargues under this sub-issue the alleged superiority of its overlapping cell system design as providing greater reliability and capacity than those of the other applicants.

21. We will affirm the judge's decision to award AWACS a preference for ability to accommodate demand. The critical factor in this comparative issue is the demonstration of a nexus between the demand survey/market research conducted by the applicant and its cellular system design. The judge's conclusion that AWACS system design is based on the results of its market research is supported by the record and is reasonable. Its system will have sufficient capacity to accommodate initial forecast demand and includes most of the high potential cellular usage areas within its service contours. *I.D.*, paras. 29-30. Celcom's assertion that it deserves credit for following "fundamental design precepts" and proposing fewer cells is unpersuasive. We have not adopted a single standard for cellular system design;[23] on the contrary, we have afforded cellular system designers and operators maximum flexibility in designing their systems. We also see no basis for awarding Celcom a preference for its "phased-in" service plan. Celcom apparently assumes that the other applicants would not institute service at all until the end of the three-year construction period allowable under our rules. 47 C.F.R. § 22.43(c). We see no reason why any carrier would delay commencing service for so long, particularly in light of the entry of the wireline carrier in the Philadelphia market. Nor has CMS demonstrated that its overlapping cell design will better accommodate demand than AWACS' system. CMS is simply repeating its request for comparative credit for its depth of coverage design philosophy and has again not demonstrated that such design is superior. The judge also found that CMS did not rely on forecasts of demand distribution in the Philadelphia MSA in designing its cell sites and channel allocation plan; CMS has not refuted this finding.

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[23] *See* Cellular Communications Systems, 86 FCC 2d at 507.

### *Ability to Accommodate Demand for Roamer Service*

22. Both CMS and MCI received a slight comparative preference for their proposals to accommodate anticipated roamer demand. The judge found CMS' proposal to enable a foreign subscriber registered in the Philadelphia system to be reached by a single unchanging access number convenient and deserving of some credit. MCI also received a slight preference since it would offer more roaming functions than CMS and, unlike AWACS and Celcom, would provide fully automatic registration.

23. The differences among the applicants' proposals regarding roamer service go to the treatment of roamers by each applicant's system and do not relate to the ability of each system to accommodate roamer traffic. Accordingly, our holding on this sub-issue in the *Chicago Final Decision* (para. 31) controls here and we conclude that there is no basis for awarding a preference to any of the applicants. Therefore, we will reverse the judge's finding that CMS and MCI are entitled to a slight preference for the ability of their respective systems to accommodate demand for roamer traffic.

24. In summary, under the sub-issues of Issue (a), we have awarded a slight preference to CMS for its geographic area and population coverage, a moderate preference to AWACS and a slight preference to MCI for their assessment of the extent and distribution of relative demand in the Philadelphia MSA, and a moderate preference to AWACS for its ability to accommodate local demand. No applicant received a preference for its ability to accommodate demand for roamer service.

### *Issue (b)*

25. *Expansion plans.* This issue calls for a comparison of each applicant's proposal for expanding its system capacity in a coordinated manner within its proposed CGSA in order to meet increasing demand. *See Chicago Final Decision, supra,* at para. 33. *In Cellular Communications Systems,* 86 FCC 2d at 503, we indicated preference should be given to designs entailing efficient frequency use, including the applicant's plans with regard to cell splitting and additional channels, the degree of frequency reuse the system will be capable of, and the applicant's ability to coordinate the use of channels with adjacent or nearby cellular systems.

26. The judge concluded that AWACS deserved a moderate preference for its expansion plan.[24] Specifically, the judge concluded that AWACS' expansion plan is based on its superior public need showing and contemplates the use of all available expansion techniques in an orderly transition from an initial omni-transmit configuration to a sectorized configuration with new cells added by cell-splitting. *I.D.,* para 83. The judge found AWACS superior to Celcom because Celcom failed to justify any of its design decisions with overall or cell-by-cell subscriber projections. He also criticized Celcom for its failure to provide a step-by-step expansion plan beyond its fourth year of operation (its first year of completed initial system operation). In addition, Celcom was found to be inferior because its proposed grade of service is lower than that of the other applicants, its system has minimal frequency reuse capabilities, and its cell structure would need substantial modification to accommodate portable units. *I.D.,* para. 84. AWACS was preferred to CMS on this issue because CMS' expansion plan is less flexible in accommodating to unforeseen demand, its system frequency reuse potential is lower, and because its expanding system would suffer undue intra-system interference. *I.D.,* para. 85. MCI did not receive a preference on this issue because it offered no specific proposal for expansion beyond its initial design and did not describe the procedures or standards to be used for identifying when expansion would be required. The judge also found MCI's system would have a lower frequency reuse ratio than AWACS and that it was likely to experience co-channel and adjacent channel interference problems. *I.D.,* para. 86.

27. Celcom, CMS and MCI all except to the preference awarded AWACS, arguing that their own proposals should be preferred. Both Celcom and MCI contend that AWACS should not receive a preference for presenting a ten-year channel plan which, even according to AWACS, will be fine-tuned further as the result of actual experience. Both applicants argue that their expansion plans preserve essential flexibility to meet the unpredictable development of demand for cellular service in the Philadelphia market and that actual operating experience is the best prediction of actual expansion needs. MCI further argues that AWACS' entire system will require frequency returning upon commencing

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[24] The judge would have awarded a substantial preference but for the fact that AWACS would not correct for significant congestion in its system as quickly as some of the other applicants. *I.D.,* para. 83.

cell splitting and both MCI and Celcom except to the judge's findings regarding their frequency reuse potential, grade of service standards and potential for intra-system interference.

28. CMS excepts to the preference awarded AWACS asserting that it provided the most detailed five-year expansion plan and that its system can readily expand during this period through the addition of channels at its existing sites. It criticizes AWACS' expansion plan as generally inferior and for failing to include information necessary to evaluate AWACS' ability to accommodate its forecast demand.[25]

29. We affirm the award of a preference to AWACS for its expansion plan with certain modifications, as set forth below. First, we have decided that the potential for co-channel or adjacent channel intra-system interference of an applicant's system is not of decisional significance, because the system operator has the ability to adjust the operating parameters of its system.[26] Thus, we reject the judge's finding that CMS' system expansion plan will experience undue interference as a result of its failing to follow "the fundamental principle" that spacing between cells should be as uniform as possible. *I.D.*, note 120. In the *Chicago Final Decision*, at para. 41, we decided that a uniformly spaced pattern is not a fundamental design requirement; on the contrary, we have sought to allow cellular applicants the flexibility to design their systems in different ways.[27] CMS' design concept, while different from that of the other applicants, appears viable and consistent with our general requirements for cellular design. Second, we do not prefer one applicant over another merely because of its prospective more extensive reuse of frequencies.[28]

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[25] CMS also excepts to the judge's exclusion of its profferred rebuttal testimony as irrelevant stating that AWACS' system would suffer serious underchannelization during expansion. The judge accepted AWACS' assertion that the exhibit CMS sought to rebut (AWACS Direct Exhibit 2, Table II, p. 148) was submitted for informational and illustrative purposes only and that AWACS Exhibits IV-A and IV-B of Exhibit 2 describe its channel requirements for its planned expansion. We have reviewed the relevant exhibits and affirm the judge's ruling. AWACS' exhibits provide channel assignments by frequency group for its 10-year expansion plan with adequate capacity to satisfy projected demand while taking into account planned sectorization and cell-splitting. Thus, CMS' rebuttal testimony, based on AWACS' theoretical omni-transmit system described in Table II, is irrelevant. Accordingly, even if we were to reverse the judge and admit the rebuttal testimony, our findings would be unaffected.

[26] Chicago Final Decision, *supra*, at para. 40; See also n. 22, *supra*.

[27] 86 FCC 2d at 507; *See also* American Mobile Communications of Washington and Oregon (Seattle Final Decision), FCC 84-368, released August 8, 1984, at para. 43.

[28] Chicago Final Decision, *supra*, at para. 39.

Third, we find that all four applicants have proposed a system grade of service acceptable to consumers and have proposed reasonable criteria for determining when increasing demand requires system expansion. Therefore, to the extent the judge discredited Celcom, CMS or MCI on these factors, or preferred AWACS, we reverse such findings.

30. With regard to the remaining exceptions, we disagree with Celcom and MCI that their expansion plans should be preferred for having a greater degree of flexibility. Celcom and MCI say they will expand their systems based on experience, while AWACS would build its large system without knowing where demand will actually develop. We agree with the judge's finding that Celcom's expansion plan does not contain sufficient detail to merit a preference. It has demonstrated no ability to expand its system beyond its initial fully constructed system design. Moreover, Celcom has misconstrued what we mean by flexibility in its assertion that its expansion plan is more flexible in light of its smaller number of widely-spaced cells. This factor does not depend on the comparison of more versus fewer cells, or closely-spaced versus widely-spaced cells, and we therefore reject its contention. *See Celcom Communications Corporation (New York Final Decision)*, at para. 35. Similarly, MCI's criticism of AWACS' expansion plan and advocacy of its own vague plan is equally unavailing. We recognize that MCI understood the alternative methods by which it may undertake expansion; however, it has failed to discuss which of these measures it would employ in Philadelphia and when it would do so. *See Pittsburgh Final Decision, supra*, at para 44; *Portland Final Decision, supra*, at para. 82.

31. As to CMS, its decision to configure its system based on its five-year projections of demand increases the likelihood that substantial modification of its expansion plans will be required if demand does not develop as projected. AWACS' approach of phasing in new cells in years 2-5 is inherently more flexible.[29] We affirm the judge's finding that AWACS' expansion plan is based

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[29] Our finding here is not inconsistent with our conclusion in *Portland* where we rejected the judge's finding that CMS' system is less flexible because its cell configuration was based on the fifth year of demand. There, all four applicants had proposed 6-8 cell systems with essentially static cell configurations for the first five years of operation. Here, on the other hand, we are comparing CMS' 23-cell system for the first five years with AWACS' dynamic expansion plan from an initial 18-cell system to 60 cells by the fifth year. Under these circumstances, a finding that AWACS' plan is more flexible is warranted. *See* Chicago Final Decision, supra at para. 43.

on its generally superior assessment of demand in the Philadelphia MSA and takes these projections into account on a step-by-step basis. We conclude that AWACS should receive a preference for its well-developed, market-specific expansion plan. At the same time, however, we recognize that the system an applicant ultimately builds will differ from that which it proposed as it modifies its plans to meet actual demand. This is particularly true with regard to system expansion. *Chicago Final Decision, supra,* at para. 41. Thus, in light of our reversal of certain findings relied on by the judge, we will give AWACS a slight, instead of a moderate, preference on this issue.

### *Issue (c)*

32. Issue (c) requires comparison of the nature and extent of services proposed by each applicant, including rates and charges, maintenance, personnel, practices, classifications, regulations and facilities (including switching facilities). In *Cellular Communications Systems* we indicated that this issue is not as significant as Issues (a) and (b). 86 FCC 2d at 503. We also stated that, while the adequacy of base station and switching facilities might be an issue in some cases, we did not expect it to be a significant issue in general. Finally, we noted that personnel and practices would be significant "to the extent that they affect an applicant's ability to implement its proposal." *Id.*

33. *Service Offerings.* The judge awarded MCI a slight preference for its service offerings. Although all four applicants would offer a variety of such services,[30] the judge awarded MCI a preference because its market research established that a need exists for six service features of which it would offer three. Celcom excepts, asserting that its public need survey also established an interest in the features it proposes to offer, *I.D.*, para. 46, and that MCI should receive a demerit for not offering all six services for which it identified demand. CMS argues that it proposed a variety of services and should be preferred on that basis without regard to demonstrating need.[31]

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[30] A chart depicting each applicant's proposed service enhancement features appears in the *I.D.*, at para. 46.

[31] CMS argues, alternatively, that it should receive a preference for its service offerings, even though it failed to establish a need for them, because MCI has done so. We find this disingenuous at best. It is difficult to treat seriously CMS' argument that need should not be a factor when at the same time it attempts to salvage a preference by relying on another applicant's need showing.

34. We affirm the judge's award of a slight preference to MCI and also will grant Celcom a slight preference for its service proposal. In the *Chicago* decision, we held that comparative credit would be awarded for an applicant's service proposal only if it demonstrates a public need for its proposed custom services. *Chicago Final Decision, supra* at para. 46. Absent this requirement, applicants would have an incentive to propose unneeded services in an attempt to gain comparative advantage. Both Celcom and MCI have demonstrated a public demand for at least some of their respective service features. In contrast, the record indicates that both CMS and AWACS failed to meet this standard; accordingly, neither will receive a preference for this sub-issue.[32]

35. *Rates and Charges.* The judge awarded CMS a slight preference for its proposed rate structure finding that its three-tiered pricing structure would foster more efficient use of the available spectrum and its system facilities. Moreover, CMS would use six-second incremental billing after the initial 30 seconds of each call, so that the subscriber is billed only for air time actually used. In contrast, Celcom and AWACS would compel their subscribers to pay for 100 minutes of air time, and along with MCI, proposed longer billing periods. *I.D.*, para. 89. We conclude that CMS' rate structure will best serve to promote the Commission's policy favoring usage-sensitive cost-based pricing and therefore affirm a slight preference for CMS. *See Chicago Final Decision, supra*, at para. 48.

36. We disagree with CMS, however, that it should receive a preference for its rate levels. The applicant argues that its overall monthly bill for the average subscriber would be consistently and substantially lower at all levels of usage and during all periods of the day. The judge found, however, that CMS did not offer evidence establishing the methodology used in formulating its proposed charges, and thus their reasonableness cannot be determined. *I.D.*, para. 89. The judge's finding is supported by the record and, consistent with our decisions in other cellular cases where CMS has requested this preference, we affirm the judge's refusal to grant comparative credit for CMS' proposed rate levels.

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[32] The three service features that MCI would not offer (redial, speed calling, 911) are a function of the customer's mobile units and are not features of a particular licensee's system. Accordingly, MCI will not receive a demerit for failing to offer these features. In addition, the fact that many service features are a function of the customer's equipment further supports awarding only a slight preference for this sub-issue.

*Chicago Final Decision, supra,* at para. 49 and n. 48; *Pittsburgh Final Decision, supra.* at para. 52.

37. *Maintenance.* The judge granted AWACS a slight preference for its maintenance proposal primarily because it was the only applicant to propose a comprehensive plan for a maintenance staff "dedicated solely to the cellular business." *I.D.,* para 92. Celcom and CMS except, arguing that AWACS did not discuss whether and to what extent it would train its employees, and asserting that each of them would have a fully trained staff.

38. We reverse the judge's award of a slight preference to AWACS for its maintenance proposal. In *Cellular Communications Systems, supra,* we stated that we did not expect maintenance proposals to present a significant issue in general. 86 FCC 2d at 502. The judge found that all of the Philadelphia applicants presented maintenance proposals that are theoretically acceptable. *I.D.,* para. 92. Our review of the record indicates that all four proposals are adequate and we do not believe that the differences relied on by the judge to support AWACS' preference, nor those advanced by Celcom and CMS to obtain a preference, to be of decisional significance. Moreover, we cannot find that any of the proposals will measurably affect any applicant's ability to implement its system. See *Chicago Final Decision, supra,* at para. 51; *Seattle Final Decision, supra,* at para. 54. Accordingly, no preferences will be granted for maintenance proposals.

39. *Personnel, Policies and Facilities.* The judge found none of the applicants' proposals worthy of comparative credit for their personnel, policies and practices, and facilities. Celcom excepts regarding the practices of AWACS and MCI: (1) that the AWACS partnership arrangement between Metromedia and Lin Cellular Communications has the potential to generate disputes which could affect AWACS' ability to implement its proposals; and (2) that MCI should receive a demerit for its plan to integrate its maintenance staff and sales and customer service facilities for its cellular and long distance businesses. CMS asserts that it deserves a preference because it is partly owned by a minority enterprise. Both CMS and MCI seek a preference for their communications experience, personnel and ability rapidly to implement their proposals.

40. None of the exceptions discussed above warrant the award of preferences on this sub-issue. We agree with AWACS that there is no merit to Celcom's speculation as to its corporate structure and no evidence in the record to support its concerns. Similarly, Celcom's assertion that MCI's existing Philadelphia

staff could not properly also handle cellular service is speculative and unsupported by the record. We also reject the arguments of CMS and MCI for preferences based on their corporate resources and experience. All four applicants have demonstrated comparable expertise. *See Chicago Final Decision, supra,* at n. 27; *Gencom Incorporated (Phoenix Final Decision),* FCC-84-476, released October 5, 1984, at para. 44. Finally, we have carefully considered CMS' request for a preference in light of the partial minority ownership of Cellular Mobile Systems of Pennsylvania by Unity Telecommunications, Inc. The judge found that CMS should not receive comparative preference for Unity's participation since, in light of Unity's failure to establish its financial qualifications, its participation in the partnership is entirely speculative. *I.D.,* para. 91. CMS has not excepted to this finding. In any case, we have found in other cellular proceedings that no preferences for minority participation should be awarded in common carrier services. Such participation, while commendable as a general matter, has not been shown to be relevant to the public interest in licensing common carrier cellular systems. *See Cellular Mobile Systems of Tampa,* FCC 84-149, released June 8, 1984; *Cellular Lottery Decision* 49 Fed. Reg. 23628 at paras. 78-79 (1984).[33] Similarly, CMS' sensitivity to consumer views, while laudable, is not encompassed by the comparative issues and merits no preference.

41. In summary, our review of the judge's decision under issue (c) concludes that MCI and Celcom are each entitled to a slight preference for their proposed service offerings and that CMS deserves a slight preference for its rate structure.

## *Other Issues*

42. *CMS/MCI Proposed Partial Settlement.* CMS and MCI have filed jointly an application for review of the Common Carrier Bureau's denial of their proposed partial settlement in this proceeding, *Celcom Communications Corporation of Pennsylvania, (Philadelphia Partial Settlement Order)* CC Mimeo 486, released October 28, 1983. In that decision, the Bureau denied the proposed partial settlement agreement because the settlement was filed after the I.D. was issued. CMS/MCI urge review,[34] arguing that the Bureau's action is in direct conflict with Commission policy and precedent encouraging settlements between mutually

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[33] *See also* Chicago Final Decision, *supra,* at para. 52; Pittsburgh Final Decision, *supra,* at para. 53; Portland Final Decision, *supra,* at paras. 112-113.

[34] Pending review, CMS and MCI are prosecuting their individual applications.

exclusive cellular applicants and that it would have a chilling effect on future settlements.

43. We will deny the CMS/MCI application for review.[35] Our policy of encouraging cellular settlements was initiated to avoid costly and time-consuming hearings and bring cellular service to the public as quickly as possible. *Cellular Reconsideration Order,* 89 FCC 2d at 77. We extended this policy to partial settlements because we felt this would simplify and expedite the conduct of comparative proceedings. *See, American Radio Telephone Service, Inc. (ARTS),* 54 RR 2d 287 (1983). In this case, the hearing was completed and the initial decision was issued. Thus, a partial settlement here would not achieve any of the goals that we have been trying to achieve through settlements. For example, a post-I.D. partial settlement would not simplify or expedite the selection of a permittee; on the contrary, it would occasion further delay to reopen the record for amendment of the surviving application, rebuttal testimony, supplemental briefs and the issuance of a supplemental decision.[36] Indeed, a policy of permitting post-I.D. partial settlements would encourage losing applicants to enter into such settlements in hope that the combined preferences of their separate losing applications would outweigh the individual preferences of the winning application, resulting in undue complications and delay and frustrating our attempts to bring cellular service to the public. No adjudicative proceeding can operate efficiently or fairly under such conditions.[37] Moreover, in contrast to CMS/MCI's claims, this decision has not had a

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[35] We will also deny CMS/MCI's joint application for review of the Bureau's denial of its request for a stay of all procedural dates pending Commission action on its application for review of the Bureau's denial of the partial settlement. The joint applicants have failed to meet the standards necessary to obtain this exceptional remedy, particularly, they have not demonstrated that they would be irreparably harmed by the continuation of the proceeding. Further delay could exacerbate the wireline headstart in this market, as well as delay the provision of service to the public, establishing that the public interest would not have been served by granting the CMS/MCI motion. *See* Virginia Petroleum Jobbers Association v. Federal Power Commission, 259 F. 2d. 921 (D.C. Cir. 1958).

[36] In contrast, a full settlement would not have required reopening of the record or further pleadings.

[37] The precedent cited by CMS/MCI is inapposite. In ARTS, we dealt with a partial settlement proposed before designation for hearing and also indicated that partial settlements during the pendency of a hearing should be encouraged. In Florida Telephone Company, FCC 84-42, released February 10, 1984, we indicated that we would impose no limitation upon an ALJ's discretion to consider a partial settlement proposed prior to issuance of an initial decision. We specifically did not rule on the question of a post-*I.D.* partial settlement such as that presented here.

"chilling" effect on settlements in other cellular proceedings.[38] Finally, the Bureau's decision did not decisionally change the outcome of this proceeding because the judge found that the proposed partial settlement would not have changed his decision. *I.D.*, note 1.

44. *Due Process.* In its exceptions, Celcom asserts that this proceeding was conducted in such a manner so as to deprive the applicants of an equitable and meaningful hearing, as required by *Ashbacker Radio Corporation v. FCC*, 326 U.S. 327 (1945), the Administrative Procedure Act and Sections 309 and 409 of the Communications Act, because the judge did not allow discovery or cross-examination by Celcom of certain AWACS witnesses. Celcom argues that these denials frustrated the development of a record upon which the best applicant could be selected. It further asserts that while cross-examination of a Celcom witness was permitted, the other applicants received the "benefit" of a paper hearing since their witnesses were not subject to the same level of inquiry.

45. We find that the procedures used in this proceeding were fully consistent with our expedited hearing procedures, 89 FCC 2d at 90–94, the Administrative Procedure Act, Sections 309 and 409 of the Communications Act and the requirements of due process. When we adopted those procedures, we explicitly left it to the judges to decide whether cross-examination was required to assure an adequate record. We conclude that the judge's decisions were not an abuse of his discretion, and that an adequate record was developed in this case.[39]

46. *Oral Argument.* Both CMS and Celcom have filed motions requesting that oral argument be held in this proceeding, arguing that this would provide the Commission with an opportunity to resolve several significant and relevant issues and clarify certain matters for future cellular decisions. We will deny the motions. As our decision here indicates, we believe that an adequate record has been developed upon which to decide this case and that oral argument would not further clarify the issues or contribute materially to the record already developed.

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[38] Post-designation nonwireline settlements have been achieved subsequent to the Bureau's action in other top-30 markets, *e.g.*, Miami, Kansas City, Dallas-Ft. Worth (partial settlements); Houston (full settlement).

[39] Celcom has made essentially the same meritless challenge to the hearing procedures used in the Pittsburgh and Seattle Proceedings. See Pittsburgh Final Decision, *supra*, at paras. 54–55; Seattle Final Decision, *supra*, at para. 58. *See also* Cellular Communications Systems, 86 FCC 2d 469, 499–501 (1981).

47. *Procedural Matters.* CMS has filed a motion to reopen the record seeking an opportunity to rebut certain conclusions first raised in the *I.D.; i.e.,* that its system would suffer undue intra-system interference and that a fundamental principle of cellular design requires uniform spacing between cells. Since, we have overruled the judge's findings on these issues, any prejudice that CMS might have suffered as a result of the judge's findings has been removed. Accordingly, the motion will be denied. See *Seattle Final Decision, supra,* at para. 59.

48. CMS has also filed a petition to reopen the record alleging denial of due process because the Commission did not give applicants prior notice that survey methodologies would be compared. CMS' petition will be denied. CMS has ample notice of the designated issues. In *Cellular Communications Systems,* 86 FCC 2d at 502, we indicated the results of public need surveys would be considered. Clearly, consideration of results presupposes examination of the methodology.[40] Thus, CMS cannot now claim lack of notice.

49. CMS has also filed a petition for leave to amend its application under Section 1.65 of the Rules, to report the addition of an issue in the *Houston Nonwireline Cellular Proceeding* relating to the qualifications of its affiliate, Cellular Mobile Systems of Texas, to be a cellular licensee.[41] In response, AWACS filed a petition for condition of grant requesting that any authorization awarded to CMS in this proceeding be conditioned upon the resolution of the qualifications issue in the Houston proceeding. We will grant CMS' petition to amend; however, in light of our affirmance of the judge's decision granting the application of AWACS for the Philadelphia nonwireline license, we conclude that AWACS' petition is moot and it will be denied.[42]

50. CMS has also filed a petition for leave to supplement its exceptions in which it seeks to have us consider its analysis of the precedents established in the Chicago and Pittsburgh Final Decisions. CMS' motion will be granted to the extent that we

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[40] In addition, Section 1.363 of the rules requires that all statistical studies offered in evidence in common carrier hearing proceedings be supported by a summary statement delineating the assumptions made and explaining the methodology used. This rule section by itself should have given CMS notice that the applicants' survey methodologies were subject to careful scrutiny.

[41] Memorandum Opinion and Order, FCC 83M-3774, released October 19, 1983.

[42] CMS has also filed petitions for leave to amend its application to report personnel changes and to update the list of licenses held by Graphic Scanning Corporation (its parent) as required by Section 1.65 of the Rules. We accept these amendments, although we have not considered them for comparative purposes in this proceeding.

have taken into account our previous decisions in reaching a decision in this case. *See Phoenix Final Decision*, supra, at para. 45.

51. We will also grant AWACS' petition for leave to amend its application to reflect consummation of the transfer of control of Radio Broadcasting Company (a 24% shareholder in AWACS) to Metromedia, Inc. (a 25% shareholder in AWACS). Celcom argues that the record should be reopened in order to examine the anticompetitive effects of the acquisition. It asserts that AWACS' two partners (LIN and Metromedia) are potential if not actual competitors in offering paging service in the Philadelphia area and that allowing them jointly to operate a cellular carrier will lead to concentration of control and anticompetitive behavior in the paging market. We fully examined the impact of Metromedia's acquisition of Radio Broadcasting on the Philadelphia paging market nearly two years ago. *Radio Broadcasting and Metromedia, Inc.*, FCC 83T-2, released February 11, 1983. The relationship between Metromedia and LIN was known to Celcom at that time, but Celcom did not object to the Metromedia acquisition. Celcom's objection here is both late and filed in the improper forum.

### *Conclusions*

52. Based on our review of the record in this case, we conclude that AWACS deserves moderate preferences under Issue (a) for its superior assessment of relative demand and its ability to accommodate local demand for service. AWACS also deserves a slight preference for its expansion plan. These preferences outweigh the slight preferences awarded CMS under Issue (a) for its area and population coverage and under Issue (c) for its proposed rate structure as well as the slight preference awarded MCI under Issue (a) for its assessment of relative demand and under Issue (c) for its proposed service offerings. Accordingly, we conclude that on a comparative basis AWACS' application is superior to those of Celcom, CMS and MCI and that the public interest, convenience and necessity will be better served by the grant of AWACS' application. Therefore, the *I.D.* is affirmed, as herein modified.

53. Accordingly, IT IS ORDERED, that the application of Automatic Wide-Area Cellular Systems, Inc., File No. 26084-CL-P-(18)-82 is GRANTED[43] and the applications of

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[43] This grant is conditioned upon the permittee obtaining the appropriate antenna structure clearances.

Celcom Communications Corporation of Pennsylvania, File No. 26164-CL-P-(16)-82; Cellular Mobile Systems of Pennsylvania, File No. 26188-CL-P-(16)-82; and MCI Cellular Telephone Company, File No. 26113-CL-P-(13)-82 ARE DENIED.

54. IT IS FURTHER ORDERED that the Joint Applications for Review filed by CMS and MCI are DENIED.

55. IT IS FURTHER ORDERED, that the Motions for Oral argument filed by CMS and Celcom, the Motion to Reopen the Record filed by CMS, the Petition to Reopen the Record filed by CMS, and the Petition for Condition of Grant filed by AWACS are DENIED.

56. IT IS FURTHER ORDERED that the Petition for Leave to File and Supplement to Exceptions filed by CMS is GRANTED to the extent indicated herein, and DENIED in ALL OTHER RESPECTS.

57. IT IS FURTHER ORDERED that the three Petitions for Leave to Amend under Section 1.65 filed by CMS and the Petition for Leave to Amend under Section 1.65 filed by AWACS are GRANTED and the amendments submitted by CMS and AWACS are accepted.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

## BEFORE THE
## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

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| In re Applications of | CC Docket No. 83-25 |
| CELCOM COMMUNICATIONS CORPORATION OF PENNSYLVANIA | File No. 26164-CL-P-(16)-82 |
| AUTOMATIC WIDE-AREA CELLULAR SYSTEMS, INC. | File No. 26084-CL-P-(18)-82 |
| CELLULAR MOBILE SYSTEMS OF PENNSYLVANIA | File No. 26188-CL-P-(16)-82 |
| MCI CELLULAR TELEPHONE COMPANY | File No. 26113-CL-P-(13)-82 |
| For a construction permit to establish a new cellular system operating on frequency block A in the Domestic Public Cellular Radio Telecommunications Service to serve the Philadelphia, Pennsylvania, Standard Metropolitan Statistical Area | |

### *Appearances*

*Curtis T. White*, *Mary E. Brooner* and *Edward Hayes, Jr.*, on behalf of Unity Telecommunications Systems, Inc.; *S. William Livingston, Jr.*, *Alan A. Pemberton*, *Thomas William Mayo* and *Jonathan D. Blake* on behalf of Celcom Communications Corporation of Pennsylvania; *Lawrence M. Miller* and *Michael T. Volkov* on behalf of Automatic Wide-Area Cellular Systems, Inc.; *Edward P. Taptich*, *Charles C. Hunter*, *Laura Mow*, *Lawrence Movshin* and *Jean Kiddoo* on behalf of Cellular Mobile Systems of Pennsylvania; *John M. Pelkey*, *Melodie A. Virtue*, *William J. Potts, Jr.*, and *Gary M. Fereno* on behalf of MCI Cellular Telephone Company; and *Jay M. Atkinson*, *Jerry M. Hermele*, *Samuel R. McConoughey* and *Frederick F. Fitzgerald* on behalf of the Chief Common Carrier Bureau, Federal Communications Commission.

## INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH CHACHKIN

Issued: September 13, 1983; Released: September 16, 1983

### *Preliminary Statement*

1. This proceeding involves the mutually exclusive applications of Celcom Communications Corp. of Pennsylvania (Celcom), Automatic Wide-Area Cellular Systems, Inc. (AWACS), Cellular Mobile Systems of Pennsylvania (CMS)[1] and MCI Cellular Telephone

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[1] CMS is a partnership comprised of two initial applicants in this proceeding, Cellular Mobile Systems of Pennsylvania, Inc. (CMS, Inc.) and Unity Telecommunications Systems, Inc. (Unity). By *Memorandum Opinion and Order* (FCC 83M–1905), released June 10, 1983, the Presiding Judge approved a merger of interests between CMS, Inc. and Unity, accepted an amendment which, *inter alia* substituted the partnership for CMS, Inc. as the applicant of record, and dismissed the application of Unity. The Presiding Judge also directed CMS to file a supplement to its direct case reflecting the amendment to its application. Pursuant to that ruling, CMS has subsequently petitioned for leave to supplement its direct case to reflect the amendment of its application. Although, as indicated *herein*, the Presiding Judge does not believe that CMS is entitled to any comparative credit for Unity's participation in the newly formed partnership, the subject supplement appears to comply with the June 10 directive. Accordingly, CMS' petition will be granted, the record will be reopened, the subject supplement will be accepted for the limited purpose of reflecting the CMS-Unity partnership, and the record will be reclosed. Also under consideration are a "Motion to Strike Portions of the Proposed Findings of Fact and Conclusions of Law of Celcom, CMS, and MCI," filed June 20, 1983 by AWACS; a Response thereto, filed June 23, 1983 by CMS; an Opposition filed June 24, 1983 by Celcom; and a "Motion to Strike Portions of CMS Reply to Proposed Findings of Fact and Conclusions of Law" filed June 30, 1983 by AWACS. AWACS' June 20 motion will be denied since it contains arguments which belong more appropriately in the reply brief which the Presiding Judge has authorized. AWACS' unopposed June 30 motion will be granted, however, since AWACS had no other opportunity to raise the objections contained in the motion, and the objections themselves are persuasive. Accordingly, the reference to testimony by AWACS' marketing consultant in the Portland cellular proceeding will be striken since AWACS is not a party to that proceeding and had no opportunity to examine the witness at issue. Likewise, at page 19, fn. 25, second paragraph of its reply brief, CMS' reference to its Rebuttal Exhibit III, pp. 6–24 will be stricken since CMS attempts to rely on material which has been excluded from the record. Finally, on August 23, 1983 CMS and MCI notified the Presiding Judge of a partial settlement they have reached, and jointly moved that the Judge defer the release of any Initial Decision in this proceeding pending the filing of papers implementing their agreement, approval of the parties settlement, the amendment of any current evidence of record necessitated by the merger of the parties' interests, and an appropriate opportunity for comment by the opposing applicants for

Company (MCI) for authority to construct a cellular system serving the Philadelphia, Pennsylvania Standard Metropolitan Statistical Area (SMSA). By *Memorandum Opinion and Order*, 48 Fed Reg. 3862, published January 27, 1983, the Chief, Common Carrier Bureau, acting pursuant to delegated authority, designated the applications for hearing on the following comparative issues:[2] [3]

(a) to determine on a comparative basis the geographic area and population that each applicant proposes to serve; to determine and compare the relative demand for the services proposed in said areas; and to determine and compare the ability of each applicant's cellular system to accomodate the anticipated demand for both local and roamer service;

(b) to determine on a comparative basis each applicant's proposal for expanding its system capacity in a coordinated manner within its proposed Cellular Geographic Service Area (CGSA) in order to meet anticipated increasing demand for local and roamer service;

(c) to determine on a comparative basis the nature and extent of the service proposed by each applicant, including each applicant's proposed rates, charges, maintenance, personnel, practices, classifications, regulations and facilities (including switching capabilities); and

(d) to determine, in light of the evidence adduced under the foregoing issues, what disposition of the referenced applications would best serve the public interest, convenience and necessity.[4]

2. Pursuant to the special procedures governing cellular radio applications in the top 30 markets,[5] the applicants filed their

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authority in this proceeding. In light of the Commission's expressed policy of expediting cellular radio hearings, the joint request of CMS and MCI will be denied. In this connection, the proposed merger would not affect the decision reached here to award the construction permit to AWACS.

[2] Two qualifying issues were also specified against Unity. Issues (a) and (b) sought to determine its financial qualifications in the five markets where it applied and the availability of its proposed cell sites in Philadelphia. In his June 10, 1983 ruling, *supra*, the Presiding Judge held that the merger of interests between CMS, Inc. and Unity rendered moot the issues specified against Unity. At the same time, however, it was concluded that Unity had not demonstrated it had the funds necessary to provide the required capital contributions under its partnership agreement.

[3] The Bureau also granted the non-wireline application of Advanced Mobile Phone Service, Inc. for authority to construct a cellular system serving the Philadelphia SMSA on a separate frequency block. The Commission provided that any grant to CMS should be conditioned upon the possible reexamination or reconsideration of that applicant's qualifications as a result of whatever decision is reached in *A.S.D. Answer Service, Inc.*, 47 Fed. Reg. 40230, published September 13, 1982.

[4] In light of the dismissal of Unity's application rendering moot issues (a) and (b), the comparative issues have been renumbered (a) to (d).

[5] *Cellular Communications Systems*, 89 FCC 2d 58, 87-91 (1982).

written direct cases with their applications on June 7, 1982. Rebuttal cases were filed on March 16, 1983. The first hearing session on the comparative issues was held on April 27, 1983, at which time the Presiding Judge ruled on the admissibility of the direct and rebuttal case exhibits. At the close of that session, the Presiding Judge instructed the parties to file additional statements of qualifications, additional affidavits, memoranda setting forth first year plans, surrebuttal, and any requests for official notice to be taken of the parties' applications.[6] These additional materials were filed on May 4, 1983. The second hearing session was held on May 12, 1983 for the purpose of cross-examination of Celcom witness Paul L. Coppage, and on May 13, 1983 a final hearing session occurred at which time the Presiding Judge ruled on the admissibility of the supplemental exhibits. At the conclusion of that session, the record was closed. Proposed findings of fact and conclusions of law were filed by the parties on June 13, 1983; reply findings and conclusions were filed ten days later.

## *Findings of Fact*

### *I. The Applicants*

3. Celcom, a wholly owned subsidiary of Associated Communications Corporation (Associated), is a Pennsylvania corporation organized to apply for cellular communications authority in Philadelphia. Associated owns and operates eleven radio broadcast stations, and is a radio common carrier in the New York Area.[7]

4. *AWACS*. AWACS is a Pennsylvania corporation jointly owned by LIN Cellular Communications Corporation (51%), Metromedia, Inc. (25%) and Radio Broadcasting Company (24%). LIN is a wholly owned subsidiary of LIN Cellular Communications, Inc., which in turn is wholly owned by LIN Broadcasting Company. LIN Broadcasting owns and operates 4 television stations, 10 radio stations, a specialty publishing company, and two radio common carriers. Metromedia is one of the nation's leading communications and entertainment companies, owning a full complement of 21 major market broadcasting stations. Recently, it has entered the field of mobile communications through the acquisition of several radio common carriers. Radio Broadcasting Company (RBC), a subsidiary of RBC Communications, and

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[6] Tr. 203, 205-210, 214-217. A prehearing conference was held on March 7, 1983, and a hearing session was held on April 13, 1983 in connection with the issues specified against Unity.

[7] Celcom Application Exhibit 1, p. 1, Direct Case Exhibit 1, p. 1; Direct Case Exhibit 9, App. A, p. 3; Direct Case Exhibit 12, p. 1.

related companies, have provided radio common carrier service in the Philadelphia area since 1956. By amendment of March 10, 1983, AWACS reported the grant of an application for transfer of control of RBC to Metromedia, which would change Metromedia's effective ownership interest in AWACS from 25% to 49%.[8]

5. *CMS*. CMS is a partnership comprised of Cellular Mobile Systems of Pennsylvania, Inc. (CMS, Inc.) and Unity Telecommunications Systems, Inc. (Unity). CMS, Inc., which holds a 70% ownership interest in CMS, is a wholly owned subsidiary of Cellular Mobile Systems, Inc. (Systems), which in turn is wholly owned by Graphic Scanning Corp. (Graphic Scanning). Graphic Scanning is a telecommunications service corporation offering a wide variety of specialized data and message processing and communications services. The principals of Unity, which holds the remaining 30% interest in CMS, include two founders and current officers of Unity Broadcasting Network, Inc., the corporate parent of the National Black Network. UBN is also the corporate parent of several radio broadcast licensees.[9]

6. *MCI*. MCI, a wholly owned subsidiary of MCI Communications Corporation (MCI Communications), is a Delaware corporation organized to apply for authority to implement cellular communications systems in various cities. MCI Communications is a specialized common carrier operating a nationwide long-distance communications network. A subsidiary of MCI, MCI Airsignal, Inc., is a radio common carrier engaged in the provision of radio paging and conventional mobile telephone services.[10]

### *II. Issue (a).*

7. *Geographic Area and Population*. The Philadelphia, Pennsylvania SMSA consists of eight counties (Bucks, Chester, Delaware, Montgomery, and Philadelphia, Pennsylvania; and Burlington, Camden and Gloucester, New Jersey) with a total land area of 3,532 square miles and a population of 4,716,818.[11] The CGSA's proposed by AWACS and Celcom each cover the entire SMSA, while those proposed by MCI and CMS will cover 92.1% (3,254 square miles) and 91.6% (3,236 square miles), respectively.[12] Using

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[8] AWACS Direct Case Exhibits 6–A, p. 2; 6–b, pp. 2–3; 7; and 8, p. 3. *See also Beep Communications Systems, Inc.*, 52 RR 2d 922 (1982).

[9] CMS Direct Case Exhibit 1, pp. 1–7; CMS April 20, 1983 amendment and June 21 supplement to direct case.

[10] MCI Direct Cases Exhibits 1, 2, 7, 8, 9.

[11] See U.S. Department of Commerce, Bureau of the Census, *State and Metropolitan Area Data Book 1982*, p. 222.

[12] CMS Rebuttal Exhibit 1, p. 4; MCI Supplementary Exhibit to Direct Case

a 100 minimum elevation to determine 39 dBu contours,[13] AWACS proposes to cover 82.9% of the geographic area of the Philadelphia SMSA (2,930 square miles), Celcom will cover 79.6% (2,813 square miles), CMS will cover 77.6% (2,741 square miles), and MCI will cover 76.7% (2,708 square miles).[14] The geographic area proposed by CMS contains 97.1% of the Philadelphia SMSA population (4,580,625), and those proposed by AWACS, Celcom and MCI contain 96.1% (4,532,000), 95.9% (4,522,583) and 95.0% (4,493,973), respectively.[15]

8. All the applicants propose to cover the major population, employment and traffic corridors in and around the city of Philadelphia. They differ, however, in their coverage of fringe areas containing the inter-SMSA traffic corridors. Celcom's 39 dBu contours will exclude a northern portion of the New Jersey Turnpike approximately 4 miles long, including Bordentown, New Jersey; approximately 2 miles of the Atlantic City Expressway and 5 miles of Route 322 leading to Atlantic City, New Jersey; the city of Morrisville, Pennsylvania, and 2 miles of the nearby

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Exhibit 27, filed February 22, 1983.

[13] The use of a 100 foot minimum elevation value is appropriate for two principal reasons. First, it appears to be the standard used by the Commission in Section 22.504(b) of the Rules, which does not provide propagation charts for elevations below 100 feet. Secondly, the use of this minimum value provides a common basis for determining the coverage areas of the applicants. In this proceeding, this rationale is especially compelling since MCI was the only applicant to attempt to extrapolate from the Carey propagation charts radial distances when the antenna radiation center fell below 100 feet in order to depict more accurately the extent of its coverage. All other applicants assumed a 100 foot minimum elevation. *Compare, e.g.*, CMS Application Exhibit X, App. X-A, p. 1, Station PA091001, note * (height above average terrain [HAAT] below 100 feet but contour calculated assuming 100 feet HAAT) and Celcom Application Engineering Statement, Figure 7-A, note * (same) and AWACS Direct Case Exhibit 2, p. 86, note * (same) with MCI Direct Case Exhibit 36, p. 4, Table 3.1-3, note * (HAAT below 100 feet with contour calculated based on extrapolation of Carey propagation charts down to radial of two miles). A comparison between the system contours of MCI, as originally filed, and those of its rivals would be meaningless.

[14] "Areas and Populations Covered by AWACS, Inc.," filed February 22, 1983; Report on Service Area and Population" filed February 22, 1983 by Celcom, as revised by amendment of April 5, 1983; "Report" filed February 22, 1983 as revised by March 18, 1983 Erratum; and MCI Rebuttal Exhibit 1, Attachment F, p. 3. In Exhibit 1 of its Rebuttal Case, MCI recomputes each of the applicants' 39 dBu contours using a 100-foot minimum height above average terrain for each radial. However, only the figures for MCI's own system will be relied upon since there appears to be a discrepancy between the figures computed for the other applicants and those which the applicants have supplied themselves. Since, according to MCI, the other applicants all used 100 foot minimum elevations to determine their service contours, no such discrepancy should exist.

[15] *Id.*

intersection of Routes 1 and 13; a 10 mile portion of the Garden State Parkway; 3 miles of Route 30 in Chester County; and a 10 mile stretch of Route 1 in western Chester County. The 39 dBu contours proposed by AWACS fail to cover a 6 mile section of the New Jersey Turnpike, including Bordentown; 4 miles of the southern most portion of Interstate Route 295 and 9 miles of the New Jersey Turnpike in southeast Gloucester County; 5 miles of Route 322, 6 miles of the Atlantic City Expressway, and 10 miles of Route 30, leading to Atlantic City; 3 miles of Route 202 near the Delaware state line; and an 8 mile section of Route 1 extending into Delaware County. In addition, AWACS does not propose a cell overlapping with its New Gretna cell. As a result, this cell stands alone and, although it covers a portion of the Garden State Parkway, is incapable of handling calls off to nearby cells should a mobile unit leave its 39 dBu contours. CMS' 39 dBu contours exclude Bordentown and a 3 mile stretch of the New Jersey Turnpike north of the city; 5 miles of both Route 322 and the Atlantic City Expressway and 7 miles of Route 30 leading to Atlantic City; 2 miles of Route 202 near the Delaware state line; 10 miles of the Garden State Parkway; and an 8 mile stretch of Route 1 in western Chester County. The 39 dBu contours proposed by MCI fail to cover approximately 2 miles of the northern most stretch of the New Jersey Turnpike in Burlington County; 3 miles of Route 30 leading to Atlantic City; Morrisville and 2 miles of Route 13 and 4 miles of Route 1; 10 miles of the Garden State Parkway; 6 miles of Route 30 in western Chester County; a pair of 2 mile stretches of Route 1 in Chester County; a 4 mile stretch of the New Jersey Turnpike in Burlington County near Masonville, New Jersey; and a 5 mile section of the Pennsylvania Turnpike in Bucks County.[16] On the

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[16] Estimates of gaps in system coverage were calculated on the basis of a visual examination of the U.S. Geological Survey maps supplied by the applicants. (*See* Celcom Direct Case Exhibit 4, as amended April 5, 1983; AWACS Direct Case Exhibit 2, as amended February 14 and April 20, 1983; CMS Direct Case Exhibit IX; and MCI Direct Case Exhibit 35, as amended March 8, 1983). The Presiding Judge agrees with the Separated Trial Staff that these highways are major traffic arteries on the periphery of the Philadelphia SMSA. The northern extension of the New Jersey Turnpike leading from Bordentown has an annual average daily traffic (AADT) volume of 60,000. Bordentown, which has a 1980 population of 4,441, is a key commercial traffic interchange between the Turnpike and Interstate Route 295. (CMS Rebuttal Exhibit II, chart accompanying p. 79). The three highways from Camden and Gloucester counties to Atlantic City - Route 30, the Atlantic City Expressway and Route 322 - have an average traffic volume of 11,700 (AWACS Direct Case Market Study, Section II, "Philadelphia Traffic Flow" (hereinafter "AWACS Map"), 3,300 (CMS Direct Case Volume III, Exhibit 2-8) and 20,000 (CMS Direct Case

**basis of the above coverage gaps, it can be anticipated that the average annual daily traffic (AADT) volume missed by each applicant will be as follows: 688,400 for Celcom; 688,800 for CMS; 961, 700 for MCI; and 1,096,100 for AWACS.[17]**

**9. The areas covered exclusively by the applicants differ in other respects as well. An analysis of the "pockets" of coverage of Celcom and AWACS reveals that, although the areas served exclusively by Celcom contain a larger population, the areas**

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Volume III, Exhibit 2-6), respectively. Routes 1 and 13 near Morrisville (1980 population 11,300) have a combined AADT volume of 36,000. AWACS Map. Morrisville is just across the Delaware River from Trenton, New Jersey, which is in a separate SMSA. The 10 mile portion of the Garden State Parkway not covered by Celcom is the only portion of the Parkway in the Philadelphia SMSA. Located in extreme southeastern Burlington County, it has an AADT volume of approximately 16,000 (AWACS Map). Route 30 in the extreme western portion of Chester County has an AADT volume of 11,600, and Route 1 in Chester County has an AADT volume ranging from 7,500 in the western part of the county to 13,000 farther east. (AWACS Map; CMS Rebuttal Exhibit II, charts following pp. 50, 65). The southern portions of the New Jersey Turnpike and Interstate Route 295 in southwest Gloucester County have an AADT volume of 23,300 and 22,800, respectively. (AWACS Map; CMS Direct Case Volume III, Exhibit 2-6). Route 202 runs through southwestern Delaware County from Route 1 in Pennsylvania to Wilmington, Delaware, and has an AADT volume of 28,700. (AWACS Map). The section of the New Jersey Turnpike near Masonville has an AADT volume of approximately 39,000, and the section of the Pennsylvania Turnpike in Bucks County has an AADT volume of approximately 35,000. (AWACS Map). Contrary to MCI's claim, the use of its 100 foot minimum elevation map in Exhibit 1 of its Rebuttal Case does not eliminate these gaps in its coverage. AWACS and MCI both rely on alternative propagation studies to demonstrate more extensive system coverage than indicated by 39 dBu contours predicated by FCC Report No. R-6406, "Technical Factors Affecting The Assignment of Facilities in the Domestic Public Land Mobile Radio Service," by Roger B. Carey (Carey Report). The AWACS study is based on procedures set forth in "Transmission Loss Predictions for Tropospheric Communication Circuits", Volume I and II, NBS Technical Note 101 (Revised) and utilized; the Longley-Rice methodology for a specific terrain analysis. (AWACS Direct Case Exhibit 2, pp. 14, 31, 135A). MCI bases its study on a Longley-Rice point-to-point propagation model and its own "engineering judgment." (MCI Exhibit 36, p. 28). Although Section 22.903(c) of the Commission's Rules authorizes the submission of these alternative studies, it requires that such analyses be fully supported by pertinent data and calculations. Neither AWACS nor MCI has satisfied these stringent requirements. Moreover, neither applicant discusses the impact of its studies on its overall system coverage, or applied the studies to the competing systems. As a result, a valid comparison of the area covered by the respective applicants based on these alternative methodologies cannot be made. Both analyses, therefore, will be ignored for comparative purposes.

[17] In order to determine the anticipated traffic volume missed by each applicant, the Presiding Judge multiplied the highway area missed by the AADT volume on that highway stretch. These calculations are as follows:

served by AWACS have more businesses, employees, high income households, and will generate more users. The areas served exclusively by AWACS but not MCI will be superior with respect to all the above factors, and will contain a higher population as well. By contrast, the pockets proposed by CMS contain a higher population, more businesses, employees and high income households, and will generate more users, by AWACS' own estimation, that the areas to be served exclusively by AWACS.[18]

10. CMS also urges the Presiding Judge to compare the applicants on the basis of their respective "depths" of coverage, *i.e.,* the number and reach of overlapping cells incorporated into a particular system design. According to J. Douglas Wells, its Vice President for Technical Services, coverage depth serves to enhance the quality and reliability of cellular service since overlapping cells provide potential multiple paths for subscribers to access the system from a given location. It is also claimed that depth of coverage allows for greater flexibility in accomodating occasional, but substantial, increases in demand by allowing capacity in multiple cells to be shifted to the overlap area. Finally, Mr. Wells testified that overlapping coverage allows for

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| | | | *MCI* | | *AWACS* | | *Celcom* | | *CMS* | |
|---|---|---|---|---|---|---|---|---|---|---|
| *Area* | *Highway* | *AADT* | *Gap* | *Loss* | *Gap* | *Loss* | *Gap* | *Loss* | *Gap* | *Loss* |
| 1 | NJTPK near Brdntwn. | 60,000 | 2 | 120,000 | 6 | 360,000 | 4 | 240,000 | 3 | 180,000 |
| 2 | I-295 | 22,800 | 0 | 0 | 4 | 91,000 | 0 | 0 | 0 | 0 |
| | NJTPK in Glstr. County | 23,300 | 0 | 0 | 9 | 209,700 | 0 | 0 | 0 | 0 |
| 3 | 30 | 11,700 | 3 | 35,100 | 10 | 117,000 | 0 | 0 | 7 | 81,900 |
| | ACE | 3,300 | 0 | 0 | 6 | 19,800 | 2 | 6,600 | 5 | 16,500 |
| | 322 to AC | 20,000 | 0 | 0 | 5 | 100,000 | 5 | 100,000 | 5 | 100,000 |
| 4 | 1 &13 Morrisville | 36,000 | 6 | 216,000 | 0 | 0 | 2 | 72,000 | 0 | 0 |
| 5 | 202 | 28,700 | 0 | 0 | 3 | 86,100 | 0 | 0 | 2 | 57,400 |
| 6 | GSP | 16,000 | 10 | 160,000 | 0 | 0 | 10 | 160,000 | 10 | 160,000 |
| 7 | 30-Chester | 11,600 | 6 | 69,600 | 0 | 0 | 3 | 34,800 | 0 | 0 |
| 8 | 1-Chester | 7,500-13,000 | 4 | 30,000 | 8* | 112,500 | 10 | 75,000 | 6* | 93,000 |
| 9 | NJTP Masonville | 39,000 | 4 | 156,000 | 0 | 0 | 0 | 0 | 0 | 0 |
| 10 | Pa.TP | 35,000 | 5 | 175,000 | 0 | 0 | 0 | 0 | 0 | 0 |
| TOTAL | | | | 961,700 | | 1,096,100 | | 688,400 | | 688,800 |

*Varying AADT figures used, depending on segment of highway involved.

[18] AWACS Rebuttal Exhibit 2, pp. 4–14. See also CMS rebuttal Exhibit II, pp. 7–19.

enhanced services in areas that are characterized by dense concentrations of large buildings.[19] For their initial operating years, the areas of overlap proposed by the applicants are as follows:[20]

| *No. Cells Overlap* | *CMS* | *AWACS* | *MCI* | *Celcom* |
|---|---|---|---|---|
| None | 1,047 | 1,946 | 1,763 | 1,690 |
| 2 cells | 591 | 794 | 934 | 938 |
| 3 cells | 532 | 124 | 267 | 292 |
| 4 or more cells | 751 | 0 | 253 | 12 |

11. CMS' request that the applicants be compared on the basis of their respective "depths of coverage" will be denied. To begin with, the concept of "depth of coverage" is not encompassed by any issues in this proceeding. Indeed, in its *Report and Order on Cellular Communications Systems,* 86 FCC 2d at 502–503, the Commission ignored this alleged criterion as a basis for comparative analysis. Moreover, CMS' superiority under this standard is both deceptive and meaningless. From a propagation standpoint, the 39 dBu contours required by the Commission assume a 90% probability of coverage within a contour area. 47 CFR 22.504. Each additional overlap represents a progressively smaller increase in the quality of coverage so that a single cell coverage will provide a 90% likelihood of coverage, 2 cell overlap will provide a 99% likelihood of coverage, and a 3 cell overlap will provide a 99.9% likelihood of coverage. (MCI Surrebuttal Exhibit 1, pp. 4–5). Any additional "depth of coverage" beyond three cell overlap is engineering overkill and a waste of economic resources. Similarly, CMS' "depth of coverage" analysis is based on the applicants' first year systems. However, at least one applicant (AWACS) will implement cell-splitting and sectorization in its system beginning with its second year of operation. Likewise, although CMS does not specify when it intends to sectorize its antennas, it will do so at any time during its first five years of service, if demand warrants. By CMS' own admission, such sectorization will reduce its depth of coverage advantage. Thus, any superiority CMS might claim for its cell overlap would be extremely shortlived. Moreover, although CMS' 3 and 4 cell overlap exceeds that of the other applicants, its 2 cell overlap is inferior, and CMS has in any event failed to demonstrate that the overlap proposed by its competitors would be insufficient to accomodate demand. Finally, as discussed in the findings, *infra,*

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[19] CMS Direct Case Exhibit IV, pp. 1–2; CMS Rebuttal Exhibit I, pp. 5–7.

[20] CMS Rebuttal Exhibit 1, p. 8.

the multiple cell overlap in CMS' system will also generate undue co-channel interference.

12. Relative Demand for Service. Each of the applicants conducted studies to determine relative demand for cellular radio service. Based on their research, the applicants forecast demand as follows:

| *Year of Operation* | *Celcom*[21] | *AWACS*[22] | *CMS*[23] | *MCI*[24] |
|---|---|---|---|---|
| 1 | 1,300 | 8,681 | 4,254 | 3,000 |
| 2 | 4,100 | 10,471 | 9,919 | 6,300 |
| 3 | 7,690 | 13,869 | 16,999 | 10,000 |
| 4 | 11,900 | 18,563 | 22,655 | 14,600 |
| 5 | None | 22,999 | 28,302 | 19,700 |
| 6 | None | 28,478 | None | None |
| 7 | None | 33,379 | None | None |
| 8 | None | 39,030 | None | None |
| 9 | None | 44,090 | None | None |
| 10 | None | 48,545 | None | None |
| 11 | None | 51,690 | None | None |

13. Under the supervision of Paul L. Coppage, its Director of Corporate Development,[25] Celcom conducted two studies "to determine and confirm the demand for cellular service" in the Philadelphia SMSA.[26] The first of these was a user survey based on telephone interviews with 99 Philadelphia businesses selected from the current city directory. In order to determine which types of establishments to contact, Celcom relied on a Lehman Brothers Kuhn Loeb industry review of the cellular market which is not a part of the record. Of its 99 respondents, 36 offered "services", 17

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[21] Celcom Direct Case Exhibit 5, Appendix A, p. 3; Tr. 284. As indicated below, Celcom proposes to phase-in operation of its cellular system instead of waiting to construct all of its cells. The Celcom demand figures are dated from the grant of the applicant's construction permit and include 9 months of pre-operation. (Celcom Rebuttal Exhibit 18, p. 10. Direct Case Exhibit 13-A, p. 7).

[22] AWACS Direct Case Demand Survey, III.B.1. The figures in the AWACS column represent AWACS' share of the units in service in the Philadelphia market under an "expected" scenario. *See infra.* AWACS first year demand forecast is for the year 1983.

[23] CMS Direct Case Exhibit IV, p. 13. In Exhibit II, p. 14 of its direct case, CMS states that 28,302 units represents "the total market need for Philadelphia cellular telephones." It appears from a Table appearing on Exhibit IC, p. 14, however, that this figure is a fifth year projection. CMS does not indicate when it anticipates its proposed service will commence operations.

[24] MCI Direct Case Exhibit 29, p. 3. The figures in the MCI column represent the number of subscribers to the applicant's service, as of the 12 months ending June 30th, beginning with 1985.

[25] Mr. Coppage has acknowledged that he is "not an expert in statistics or polling or in designing a scientific public survey." Celcom Exhibit 13B, p. 7.

[26] Celcom Exhibit 2, p.1.

were construction companies, and 44 were classified as "other". Respondents were questioned on such matters as preference concerning type of cellular subscriber unit, whether the interviewee would subscribe to cellular service at specified monthly rates, and preference concerning the lease or purchase of equipment.[27] Although Mr. Coppage states in Exhibit 2 of Celcom's Direct Case that one of the purposes of the user survey was to confirm and quantify the need for cellular service in the Philadelphia market, he subsequently admitted that "system and cell-by-cell subscriber projections were not directly derived or calculated from the results of the study."[28] Mr. Coppage also conceded that the study "was not intended to be a statistically scientific survey." Instead, Celcom relied on its mobile marketing experience, mobile telephone user data from industry sources, and Mr. Coppage's experience to determine the projected number of users.[29] In none of its exhibits, however, does Celcom explain the basis of its subscriber projections.

14. Celcom also conducted a demographic analysis based on a review of Urban Decisions Market Memos, compiled by Urban Decisions Systems, Inc. On the basis of this analysis, Celcom has determined that Philadelphia is the fourth largest metropolitan area in the United States and that there are a large number of individuals in the area engaged in activities that traditionally have had a need for paging services.[30]

15. In support of its demand projections, AWACS relies on a cellular radio market study performed by Compucon, Inc., a subsidiary of A. C. Nielsen Company.[31] This study had three major objectives: to develop a cellular service user profile; to forecast the demand for cellular service during the first eleven years of operation, beginning in 1983; and to distribute the forecast demand throughout the SMSA on a census tract level in order to ensure adequate service to a large majority of the area's high potential users.[32]

16. Compucon derived its user profile from a "primary" public need telephone survey conducted by Marketing and Research Counselors, Inc. (MARC) of 889 randomly selected business

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[27] *Id.* at pp. 1–7.

[28] *Id.* at p. 1; Celcom Exhibit 20, Appendix A, p. 1.

[29] Celcom Exhibit 13B, p. 3; Celcom Exhibit 3, p. 2.

[30] Celcom Direct Case Exhibit 2, pp. 1, 7–8.

[31] AWACS Direct Case Exhibit 4, Volumes 3 and 4.

[32] Compucon is also responsible for the engineering of the AWACS system. See AWACS Direct Case Exhibit 2.

establishments in the Philadelphia area.[33] Interviewers contacted the executive or manager in charge of specifying or purchasing telephone equipment for each company, read a brief description of the proposed service, and asked interviewees to indicate their interest in cellular service "at a price you felt was reasonable," and at four quoted monthly prices ($60, $120, $180, $240). The prices were stated as including equipment lease as well as service, but not including long distance charges. Respondents were also asked various questions regarding the number of units they were interested in acquiring, and the nature of their company. On the basis of this survey, Compucon determined that 34.7% of all respondents were "somewhat" or "very interested" in cellular service at a price they thought to be reasonable; that demand for cellular service fluctuated with price; and that there existed a mean demand of 3.2 units per customer among respondents who indicated they were interested in cellular service.[34]

17. MARC also conducted a telephone survey of 800 randomly selected residents of the Philadelphia SMSA to determine demand in a situation where cellular equipment would be customer-owned and maintained (COAM). For this survey, interviewers contacted the head of the household, briefly described the proposed service, and asked respondents how interested they would be in mobile or portable service at a given price for equipment and at a given price for service, and how many units they might purchase. On the basis of this survey, Compucon determined that 48.25% of all respondents with annual incomes of $50,000 or less were "somewhat" or "very interested" in cellular service, and that demand for cellular service was price sensitive. Compucon states that this survey was not incorporated into its demand forecasts.[35]

18. MARC also conducted a telephone survey of 800 randomly selected business establishments in the Philadelphia area to determine price/demand sensitivity where cellular equipment is

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[33] Compucon has assumed that the potential users of AWACS' cellular service will at least initially be businesses, as opposed to individual residents. This assumption is based on the composition of current mobile telephone and paper users, and on the fact that cellular service will initially be relatively expensive. The random sample used by MARC was provided by Dun's Marketing Services, a subsidiary of Dun and Bradstreet, and includes all business establishments, government offices, institutions and non-profit organizations. *Id.* at I.B. 1, II.B.2.

[34] *Id.* at II.B.1-11.B.6, III.A.1-III.A.15.

[35] *Id.* at II.C.1-II.C.3, III.C.1-III.C.3, I.B.1. Interviewers quoted to respondents four price sets for this survey: $2,500 for equipment and $50 for monthly service; $2,500 for equipment and $30 for monthly service; $1,000 for equipment and $50 for monthly service; and $1,000 for equipment and $30 for monthly service. II.C.3.

customer-owned and maintained. This survey sought to verify that demand established in the primary public need survey, in which equipment lease was assumed, also existed in a situation where respondents were presented with initial equipment purchases. For this survey, MARC used the same questionnaire as that employed for its residential COAM survey, and the same methodology as that employed in the first survey of potential business customers. On the basis of this survey, Compucon determined that demand for cellular radio service was price sensitive, and that the mean demand in number of units was 3.3 per customer. The survey also indicates significantly less business demand for cellular service than that indicated by Compucon's primary public need survey. AWACS has elected to base its engineering assumptions on the latter.[36]

19. Compucon projected demand for cellular service in the Philadelphia SMSA on the basis of the MARC "primary" need survey of 889 randomly selected business establishments. This projection entailed analysis of several variables, including the rate of business growth, demand for service at various prices, average number of units per customer as determined from the public need survey, actual demand of interested persons (penetration rate), and percentage market share. By changing these variables, three different "scenarios" — expected, optimistic, and pessimistic — were established to project the aggregate demand for units in any given year. The "expected" need for AWACS cellular units in 1983 — 8,681 — assumes a business growth rate of 0.8%, an average monthly cost of $135, 3.2 units per customer, a 20% penetration rate, and a 50% market share for AWACS. AWACS' 1983 "expected" demand projection of 51,690 units assumes the same business growth rate estimation of units per customer and market share, but is based on a lower monthly cost ($72), and a higher penetration rate (75%).[37]

20. To determine where demand for cellular service could be anticipated, Compucon then developed high potential area profiles for the Philadelphia SMSA in 1983 and 1993. To accomplish this task, Compucon first collected data on a census tract level on a number of demographic variables considered to be key indicators of cellular demand, such as construction activity, commercial

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[36] *Id.* at I.B.1, II.D.1-II.D.3, III.D.1, IV.A.1-IV.A.2.

[37] *Id.* at I.E.1-I.E.2, II.E.3-II.E.9, III.A.1-III.B.2. In connection with an analysis of demand for cellular service in the New York SMSA, Compucon assumed different monthly costs and market penetration rates. *See* Celcom Rebuttal Exhibit 18, pp. 12-14.

industrial and office space, high-income residential development, and heavy traffic flow. This data was collected in a variety of forms, including maps, and high potential area boundaries were drawn to encircle the substantial potential user concentrations in the total SMSA.[38] Local market authorities were consulted through an on-site data validation procedure to minimize any potential discrepancies.[39] Compucon then determined demand for cellular service within the high potential area by deriving a market potential index for each census tract based on a variety of demographic factors, including residential population and projected growth, working population by Standard Industrial Classification (SIC) category, average household income, construction activity, commercial activity, traffic flow, the number of businesses and special user concentrations. Weights were assigned to each of these data variables in generating a market potential index for each census tract based on consultation with marketing experts and independent data from verification sources.[40] On the basis of this analysis, Compucon distributed overall demand to each census tract over the entire SMSA for each scenario for the first and eleventh years of operation of the AWACS cellular system.[41]

21. On behalf of CMS and its cellular affiliates, Graphic Scanning commissioned a number of nationwide market research studies in an effort to forecast demand for cellular service in the Philadelphia SMSA. Graphic's research is based on the premise that paging service is the closest product precursor of cellular radio and that the primary initial users of cellular radio will be business and service establishments. To determine the need for cellular service in the Philadelphia SMSA, CMS submitted the following studies.[42]

A. *Pager Market Projections.*[43] This study, showing the potential for paging services in the Philadelphia SMSA, was conducted by Claritas Corporation, a market research firm. Claritas based its projections on observed sales records showing sales made in 4 or 6[44] unnamed markets and for customers characterized as "representative." This data, comprising a nationwide sample of 5,541 accounts, was supplied by another Graphic Scanning affiliate. Claritas coded the sample by SIC code and projected demand for paging services. The assumptions of this study are that the penetration of the affiliate into the SIC codes is representative of the paging industry; that the sample was properly drawn and reflects the affiliate's penetrations; and that the markets studied are representative of the remaining areas of the country. The Claritas study projects 16,020 "accounts" and 40,412 pagers for the Philadelphia SMSA.

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[38] *Id.* at I.A.3, II.F.2–II.F.11.

[39] *Id.* at II.F.19.

[40] *Id.* at II.G.1–II.G.13, Appendices F and G; I.F.i–I.F.2.

[41] *Id.* at II.G.1–II.G.13, Appendices G and L.

[42] CMS Direct Case Exhibit II, pp. 5.12.

[43] CMS Direct Case Volume 2, Section I.

[44] The actual number of markets sampled is not clear; Page 2 of Volume 2, Section I suggests that 6 markets were sampled, while Page 3 suggests that only 4 were sampled.

B. *Graphic Scanning Telephone Survey of General Population.* For this survey, Graphic selected 128 Philadelphia SMSA business establishments from an unidentified sample frame, and completed 63 interviews. Respondents were questioned as to their interest in service in June 1983 at specified monthly costs, the number of units they might purchase, and other factors. Actual frequencies and percentages observed were then enlarged by a factor representative of the difference in the sample size and the size of the actual population. When adjusted for non-response, the Graphic survey indicates that 9,400 business establishments would use cellular radio in June 1983, if available at a monthly cost of $110; 9,400 at up to $130; and 9,250 at up to $150.[45]

C. *Graphic Scanning Telephone Survey of Paging Customers.* For this survey, Graphic selected 363 businesses in the Philadelphia area which are customers of its paging service, and completed 224 interviews. Respondents were questioned as to the same matters raised in the telephone survey of the general population, and as with that other survey, actual frequencies of responses were enlarged. According to this survey, when results are adjusted for nonresponse, 259 establishments would use cellular units in June 1983 if available at a cost of $110 per month; 209 at up to $130, and 206 at up to $150.[46]

D. *Graphic Scanning Mail Survey of General Population.* For this survey, Graphic mailed questionnaires to 1,021 businesses in the Philadelphia SMSA drawn from the 15 most pager oriented SIC codes as determined by Claritas, and received 88 (8.6%) responses. All those who did not return the questionnaire were considered a "no" response to the question of need for cellular service. Of those questionnaires returned, 85.2% came from respondents who indicated that they would consider subscribing for cellular service. When adjusted for nonresponse, however, this figure dropped to only 7.3%. The survey shows no significant difference between preference for mobile over portable service; a willingness to pay $53 per month for service if units are purchased, and $83-84 per month if units are leased. Respondents were also questioned as to which areas of the city they expected to use cellular units, and at what time of day.[47]

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[45] CMS Direct Case Volume 2, Section II, pp. 1–5, and Table 3–6A. When adjusted for nonresponse, these figures are 6,730; 6,730; and 6,597, respectively. Table 3–6B.

[46] CMS Direct Case Volume 2, Section III, pp. 1–5, and Table 3–4A. When adjusted for nonresponse, these figures are 187; 152; and 147, respectively. Table 3–4B.

E. *Graphic Scanning Mail Survey of Paging Customers*. Using the same methodology as for its other mail survey, Graphic sent out 12,225 questionnaires to its paging customers, and received 1,624 responses (13.3%). This survey shows 89.5% of all respondents indicating they would consider cellular service, 11.9% when adjusted for nonresponse. The survey also indicates a significant preference for portable over mobile service; a preference for leasing units; and that the mean amount respondents would be willing to pay monthly for cellular service is $51.56-52.06 if units are purchased, and $79.53-81.96 if units are leased.[48]

F. *Area Profile and Cellular Mobile Telephone Market Survey*.[49] This survey, conducted by Westat, Inc., is divided into three parts. The first section is a demographic profile of the Philadelphia SMSA and its component counties, and includes information on the ethnicity of the area population, rate of growth, household income, housing and employment. Computer generated density maps were also prepared, showing the geographic distribution of households with incomes of $50,000 or more, all households, and private employment. The second section of the Westat survey describes vehicular traffic patterns and key metropolitan facilities and includes maps showing traffic volume and large traffic generators. Westat also conducted a telephone survey of private business establishments that resulted in 67 completed interviews in the Philadelphia SMSA (66% response rate) and 2,171 interviews in the top 30 SMSA's (78% response). In order to derive gross estimates of market demand in Philadelphia, Westat employed a "synthetic estimate" procedure in which the data for all top 30 SMSA's were combined and a weight of .3 was assigned to the relevant Philadelphia market area. The Westat survey, when adjusted for nonresponse, estimates a need for 54,200 mobile units and 45,800 portable units during the first five years of service in Philadelphia at a monthly cost of $110 among establishments reporting likely or probable cellular use.[50]

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[47] CMS Direct Case Volume 2, Section IV, pp. 1-6. The 15 SIC codes are: health services; special trade contractors, electric and electronic equipment; business services; personal services; real estate; trucking and warehousing; automotive dealers or service stations; auto repair services and garages; building materials or garden supplies; food and kindred products; instruments and related products; furniture and home furnishings; electric, gas and sanitary services; and communications. *Id.* at 1. The sample size for this survey was predicated on a predicted response rate of 15%. *Id.* at 2.

[48] CMS Direct Case Volume 2, Section V. The sample size for this survey was predicated on a predicted response rate of 15%. *Id.* at 2.

[49] CMS Direct Case Volume 3.

22. Based on the above analyses, CMS witness Roger Paradis testified that Graphic Scanning was able to both categorize major SMSA's according to their relative need for personal communication services, and to measure the projection of absolute need required within each CGSA. Without describing his calculations or operating assumptions, or those of Graphic Scanning, he concluded that Philadelphia, along with 13 other major SMSA's, has a projected need of .0060 cellular units per 1,000 population. Based on the 1980 census population count, the total market need for Philadelphia cellular telephones is estimated to be 28,302 units for CMS' fifth year of operation.[51] Mr. Paradis failed to explain, however, how CMS' demand figures for its first four years of operation were derived.[52] Mr. Paradis also testified that Graphic Scanning used maps showing densities of total households for the SMSA, densities of households with incomes of $50,000 or more, traffic pattern information and concentration of place of employment and places of pedestrian gatherings to project models of cellular system usage. However, no more specific information is given on how these models were developed.

23. MCI's demand forecast is based on three separate studies commissioned by the applicant: a public need survey, a selected industry survey, and focus group sessions. These three studies were supplemented by demographic analysis of the Philadelphia SMSA prepared by SRI International, an independent consulting firm.[53] MCI's public need survey, designed by MCI and SRI

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[50] *Id.* at Chapter 3, pp. 3-1 through 3-6, and Table 3-1a. When unadjusted for nonresponse, these figures are 42,500 and 35,300, respectively. Table 3-1b.

[51] CMS Direct Case Exhibit II, pp. 14-16.

[52] CMS Direct Case Exhibit IV, p. 14. The Presiding Judge notes, however, that in his Initial Decision for the Chicago cellular market, the Assistant Chief Administrative Law Judge found that the Chicago systems affiliate calculated its first year demand projection by a formula used in other System markets, multiplying the fifth year projection by a factor of 15%. Applying this formula to CMS' fifth year projection for Philadelphia, the calculated first year demand would be 4,245, only 9 less than CMS has specified. *Rogers Radiocall, Inc.*, FCC 83D-49, released August 17, 1983.

[53] MCI Direct Case Exhibit 28, pp. 3-4, MCI Direct Case Volume 3, Appendix 3, Section IV.

International and conducted by Chilton Research of Radnor Pennsylvania, was designed to reach a representative sample of potential subscribers and to determine the general interest in cellular service, the expressed intent of the respondent or the respondent's firm to subscribe at various price levels, likely usage patterns, desired service enhancements, and a profile of likely subscribers.[54] The survey was conducted by telephone and consisted of the administration of a questionnaire to a sample size of 801 respondents within the Philadelphia SMSA. The sample group was selected by random digit dialing from households with incomes of at least $20,000 and a response rate of 54% was obtained.[55] After having the proposed service described to them, respondents to the public need survey were asked, *inter alia*, whether they or their firm would subscribe to the service were it available at specific price levels for cellular service and equipment. 32% of those interviewed indicated they would "definitely" or "probably" subscribe at a monthly cost of $75; 18% would subscribe at $125 per month; and 14% would subscribe at a monthly cost of $175.[56] Although SRI collected data for each of the three price alternatives, MCI focused on the $125 alternative based on the assumption that a cellular user would typically incur a monthly charge of $125 for both service and leased unit. MCI then applied an Intent Translation Scale to derive the realized demand from the gross potential demand for cellular service. Application of this scale reduced the intensity of interest proportions gleaned from the SRI study by variables which take into consideration MCI's assumption that respondents in surveys of this type will indicate a greater willingness to subscribe then will be found in practice.[57] On the basis of its calculations, MCI concluded that there existed a 7.4% realizable demand for cellular radio service in the Philadelphia SMSA at $125 per month. Extrapolating this result to an estimate of the qualified universe in the SMSA in mid-1985, it estimated the realizable demand to be at least 63,100 subscribers.[58] In making its 5 year subscriber forecast, *supra*, MCI considered such factors as elasticity of demand, changes in price of service and equipment over time, the introduction of new features and service capabilities, the impact of distributors, dealers and resellers, changes in customer usage patterns and preferences, evolving traffic patterns, pent-up demand and population and industrial development, and other demographic changes.[59] No information is provided, however, as to how these factors were integrated to yield MCI's forecast.

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[54] MCI Direct Case Volume 3, Appendix 3, Section I, p. 3.

[55] MCI Direct Case Volume 3, Appendix 3, Section III, p. 3 and Section VI, Appendix A, pp. 5, 7. MCI defined its universe on the assumption that higher income individuals are more likely to be users of cellular service. Exhibit 28, p. 7.

[56] MCI Direct Case Exhibit 28, p. 12, MCI Direct Case Volume 3, Appendix 3, Section IV, p. 4 and Section VI, pp. 53–64. SRI's study also reflects that 68% of all respondents "probably" or "definitely" would not subscribe for cellular service at $75 per month, or had no interest at all in a cellular radio service. At a monthly cost of $125, 82% of all respondents fell into these categories, and 85% of all respondents fell into these categories at a monthly cost of $175.

[57] MCI estimated that of the respondents who indicated that they or their firms indicating they would "probably" subscribe, 30% would actually subscribe; and that of those indicating that they or their firm would "Probably not" subscribe, 5% would subscribe. MCI Direct Case Exhibit 28, p. 13.

24. MCI's selected industry survey consisted of telephone interviews with 100 businesses in the Philadelphia SMSA. Companies interviewed were chosen from five industry sectors that are expected to have a need for cellular service: fire, insurance, and real estate; services; construction; transportation and public utilities; and manufacturing. However, no attempt was made to approximate a random sample, and SRI does not elaborate on the criteria it used to make its selection. The purpose of the survey was to gain qualitative insight into the attitudes toward cellular service of likely business subscribers. Specifically, the survey elicited information regarding the level of interest in cellular service, sensitivity to price, likely usage patterns, and characteristics of likely user companies.[60] Of the 100 respondents which SRI interviewed, 51 stated that they are or might be interested in cellular service if cost were not a major factor. However, the study indicates that demand for cellular service is price sensitive, and that at a monthly cost of $125 per phone, only 29 respondents stated that they would definitely or probably subscribe.[61] The selected industry survey did not affect MCI's estimation of realizable demand or its forecast of potential subscribers. Rather, the survey was conducted to enhance MCI's understanding of the marketplace.[62]

25. MCI also commissioned Lieber Attitude Research, Inc. (Lieber) to conducted a series of four "focus group" sessions to study the attitudes and needs of potential subscribers. Focus interviewing is described as a qualitative research technique which

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[58] MCI Direct Case Exhibit 28, p. 14.

[59] MCI Direct Case Exhibit 29, p. 2.

[60] MCI Direct Case Volume 3, Appendix 3, Section VI, Appendix B, pp. 3-8.

[61] Id. at pp. 12, 15.

[62] Id. at pp. 3-4.

concentrates on identifying the attitudes and motivations behind consumer behavior by conducting in-person, open-ended group discussions with selected individuals in an informal setting.[63] The participants of the sessions conducted for MCI were employed in industries or professions (*e.g.*, building contractors, manufacturer's representative, doctors) "where the special advantages of mobile telephone service are likely to be important"; spent 6 or more hours per week away from their primary office or base of operations; and were either interested in obtaining mobile telephone service at a cost of $100–$150 per month, or, currently using mobile telephone service or paging service. If not currently using either mobile telephone or pagers, participants had incomes of $45,000 or more. Unlike the selected industry study, the focus group sessions (which were conducted in Los Angeles and Dallas) were designed to yield qualitative results only, and did not affect MCI's statistically expressed estimates of realizable demand or potential subscribers.[64] The focus group study investigated interest in cellular service, likely usage, methods of evaluating service prior to subscribing, attitudes toward service offered by wireline and non-wireline companies, additional desirable features, preferences concerning portable or mobile units, particular equipment suppliers and purchase or rental of equipment.[65] According to Lieber, the key implications of its sessions are that price/value perceptions are key to serious interest in cellular service; that the availability of cellular service is likely to increase overall usage of telephone systems; that the availability of equipment and service from multiple suppliers is important to consumers' acceptance of cellular service as the best possible service at the best possible price; that an expectation of lower rates, more responsive customer service, and a preference for "the other guy" are likely to attract many prospective users to mobile telephone services offered by competitors to the local telephone company; that the telephone company is likely to attract conservative minded persons who feel that the company has resources to provide the best service, and who also feel more comfortable going to the larger, more established entity; and that MCI seems likely to attract a considerable number of those who prefer competitors to the local telephone company.[66]

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[63] MCI Direct Case Volume 3, Appendix 2, pp. 1–4.

[64] *Id.* at p. 5.

[65] *Id.* at p. 2.

[66] *Id.* at pp. 6–10.

26. SRI's demographic analysis of the Philadelphia SMSA contains information about the area's present and projected population, housing and income distribution on a county and 3 mile by 3 mile area basis; on the current and projected payroll business establishments, and employment for the SMSA and its composite counties; and on transportation and land usage characteristics of the SMSA.[67]

27. *Ability to Accomodate Anticipated Demand for Local Service.* Celcom proposes a 16 cell system for the Philadelphia SMSA, to be constructed in three stages. Within a year after grant of a construction permit, Celcom will construct 5 cells in the more densely populated center region of its proposed CGSA, and by the end of the second year after grant of its permit, 13 cells will be built. All 16 cells will be constructed within 3 years.[68] Celcom proposes to phase-in operation of its cellular system, commencing service once its central switch and first cell are in place.[69] Celcom designed its fully constructed system by directing its engineers to develop the largest CGSA possible "that would cover all areas where service was necessary or would be economical."[70] Starting with a cell providing service to the market center, using a 7 cell reuse pattern,[71] and assuming a 16 mile distance between cells, the engineers provided Mr. Coppage with a "preliminary cell structure." Celcom's engineers subsequently received the precise location of the system's sites, and adjusted the operating parameters of individual base stations to maximize coverage of the system and to minimize predicted service extensions outside the SMSA. Their primary techniques to accomplish these goals were use of directionalized transmitting antennas, adjustments in the height of antennas, and adjustments in transmitter output power. As proposed, Celcom will configure its system with 10 directional and 6 omni-directional antennas.[72] For its fourth year of operation, when its proposed 16 cell system commences services, Celcom will also provide 375 voice channels and 16 signal channels, reusing 98 voice channels. These 375 channels are designed to provide service to 11,400 subscribers at

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[67] MCI Direct Case Volume 3, Appendix 3, Section IV.

[68] Celcom Exhibit 5, pp. 2, 3, as amended February 28, 1983.

[69] Celcom Exhibit 4, p. 3; Celcom Exhibit 5, p. 2; Tr. 279.

[70] Celcom Exhibit 4, p. 2.

[71] In a 7 cell reuse pattern, all available channels are divided into 21 groups, with 44 to 45 voice channels assigned to each cell.

[72] Celcom Exhibit 4, pp. 2-4. Official notice is taken of Celcom's Engineering Exhibit, Tables 1-16, paragraphs 18, in which the radiation characteristics of the applicant's installed antennas system are described.

a 0.05 grade of service, based on the Erlang B traffic formula and premised on the assumption that each call will have a 100 second (0.026 Erlang) holding time.[73] The numbers of channels assigned to each cell was determined by Mr. Coppage, after construction with Harris personnel and "standard references." Celcom engineers in turn determined which frequencies to assign to each cell.[74] The switch and base station equipment for Celcom's system will be manufactured by Harris Corporation.[75]

28. Celcom's initial system[76] embodies several shortcomings which detract from its overall efficiency. To begin with, the capacity of Celcom's system to serve projected demand for its first three years of phased-in operation is unverifiable, since no details are provided as to these initial configurations.[77] In addition, although Celcom projects 11,900 subscribers in its fourth year of phased-in operation, its system is configured to serve only 11,400 subscribers. Thus, Celcom's system will be unable to accomodate projected demand in the first year of operation for its completed system.[78] Celcom has also conceded that its system will require reconfiguration during its third year of operations in 1986, and that individual cells, or the entire system will probably have to be redesigned, in order to accomodate the needs of portable units.[79] Finally, the frequency group assignments in Celcom's system do not appear to follow the standard 7 cell reuse plan, and co-channel interference on 5 voice frequencies will indeed occur between two of its cells (7 and 9). There are also two cases where adjacent signalling channels are used at adjacent cell sites in potential hand-off situations (Cell 14 to Cell 16, and Cell 14 to Cell 10), and numerous situations where one or more adjacent voice channels are used at adjacent sites.[80]

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[73] Celcom Exhibit 3, p. 2; Exhibit 4, Appendix B; Exhibit 13-A, p. 7; Celcom Rebuttal Exhibit 19, pp. 2-3; Grade of service can be defined as the probability that a telephone call will not be completed because all voice channels are busy during a period of peak traffic. It is the ratio of uncompleted calls to attempted calls in a one hour period. A grade of service of 0.01 therefore signifies that, for every 100 calls attempted in a one hour period, no more than one will be uncompleted. The Erlang B formula assumes that a call that cannot be served immediately is instantly cleared from the system and does not recall.

[74] Celcom Exhibit 3, p. 2; Exhibit 4, p. 6; Tr. 290.

[75] Celcom Exhibit 4, p. 2.

[76] Since Celcom's proposed 16 cell system will not commence operations until after a 36 month period of construction, for comparative purposes the other applicants' first year systems will be compared to Celcom's fourth year of phased-in service.

[77] AWACS Rebuttal Exhibit 5, p. 3.

[78] Tr. 284, 294. Celcom Exhibit 5, appendix.

[79] Tr. 261, 286-288; Celcom Exhibit 6, p. 4.

[80] AWACS Rebuttal Exhibit 4, p. 9.

29. For its initial year of operation, AWACS proposes an 18 cell, omni-directional system, equipped with switch and base station equipment manufactured by Anaconda Ericcson.[81] AWACS will also equip its initial system with 378 voice channels and 18 control channels, which are designed to provide subscribers with 0.02 grade of service, based on the Erlang C traffic formula, and premised on the assumption that each cell will have a .027 (97.2 second) holding time.[82] As noted below, beginning with its second year of operation, AWACS' system will evolve into cell-splitting and sectorization.

30. Compucon, which conducted AWACS' market research, designed its system as well. Robert Roenitz, Manager of Cellular Systems for Compucon, testified that, in its system design, Compucon's engineering was responsive to the input of the market study forecasts of user densities by census tract, and to ten year projections of population growth and shifts in community development. These forecasts, he stated, were instrumental in the initial placement of a cellular grid over the community to be served for the initial selection of cell sites, in sizing the cellular system, in evaluating channel requirements, and in developing AWACS' expansion plan.[83] [83a] Using the information on projected

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[81] AWACS Direct Case Exhibits 1, 2.

[82] AWACS Direct Case Exhibit 2, pp. 142, 148. The Erlang C formula is based on the assumption that subscribers will "queue up" for the first available line if service is initially unavailable. Since the Erlang C formula demands greater trunking than the Erlang B formula the effect of structuring service on the Erlang C model is to require AWACS to provide more radio channels than it would on an Erlang B assumption. (AWACS Direct Case Exhibit 6-G). Anaconda Ericcson, AWACS' equipment supplier, recommends use of the Erlang C traffic model in designing a cellular system. (AWACS Exhibit 1, "Cell Site and Frequency Deployment Recommendations", p. 56).

[83] AWACS Direct Case Exhibit 2, pp. 10-12, The geographical layout of cells in AWACS' system was also based on the constraints of establishing a repeatable reuse pattern for system expansion. AWACS' cells appear to be located as close as possible on an idealized hexagonal grid. However, some variation occurs, and is inevitable, due to constraints of land use and availability, and radio coverage propagation. *Id.* at p. 142.

[83a] AWACS' 39 dBu contours appear to cover most of the area encompassed by Compucon's high potential area boundaries, *supra*. As the other applicants note, Compucon's high potential boundaries for 1983 do not, conversely, incorporate several areas which AWACS proposes to serve. Prominent among these is the New Gretna site, which covers a sparsely populated area where only 958 people live and where AWACS itself expects to have only 2 subscribers. See, *e.g.*, CMS Findings, para. 17; Celcom Findings, para. 11. Such areas of AWACS coverage, however, including the New Gretna site, are encompassed by Compucon's high potential boundaries for 1993. In this context, it should be noted that the New Gretna site is located in Burlington County the most rapidly growing county in the region, where significant suburban growth is predicted. AWACS Public Need Survey, I.C.1, I.C.5, I-C.6.

users per cell derived from its public need survey, Compucon allocated to each cell the number of channels needed to maintain its design grade of service[84] By AWACS' own admission, there are a limited, though unspecified, number of cases where adjacent voice channels are proposed in its system at geographically adjacent cell sites in potential handoff situations.[85]

31. For its initial year of operation, CMS proposes a 23 cell omni-directional system, using 250 voice channels and 23 control channels. These channels are designed to provide a .01 grade of service based on the Erlang B formula and premised on the assumption that each call will have a 0.026 Erlang (94 second) holding time.[86] According to CMS' engineer, J. Douglas Wells, the 23 cells proposed by CMS are adequate to satisfy projected fifth year market demand. CMS, however, will install only that channel capacity at each cell necessary to meet forecast demand for the first year.[87] As noted below, additional channels on the CMS system are projected for subsequent years, and CMS has premised these projections, beginning with its fourth year of service, on a 0.05 grade of service.[88] CMS will use switch equipment manufactured by Motorola, and base station equipment manufactured by Motorola, E. F. Johnson, and Graphic Scanning.[89]

32. As noted, CMS' market research consultant testified in CMS' direct case that Graphic Scanning used maps showing densities of total households for the Philadelphia SMSA, densities of high income households and other information to project models of cellular system usage. A comparison of these materials with a map of CMS' proposed geographic area reveals, in fact, that most of the areas referenced by Mr. Paradis are encompassed by CMS' system.[90] However, nowhere does Mr. Paradis or any other CMS witness state how these demographic materials related to a specific user distribution for the Philadelphia SMSA. Indeed, it would appear that these surveys were not used to determine user location since CMS has allocated the number of users per cell for its first 5 years of operation based on a semi-uniform projection of demand. CMS Cells 1 through 10 were projected to

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Nowhere in the record does there appear to be a breakdown of users per census tract or cell in AWACS' system.

[84] AWACS Exhibit 2, pp. 20-25.

[85] AWACS Rebuttal Exhibit 4, p. 6.

[86] CMS Direct Case Exhibit III. p. 17; Exhibit IV, p. 14; Exhibit IX, pp. 5, 6.

[87] CMS Exhibit IV, 10, 14, 4; Exhibit IX, p. 2.

[88] CMS Exhibit IV, pp. 12, 14-15.

[89] CMS Exhibit IV, p. 6; Exhibit IX, Table 2.

[90] Compare maps attached to end of CMS Direct Case Volume 3 to CMS Direct Case Exhibit IX.

encompass 293 users each in the first year of operation and Cells 15 through 23 were projected to encompass 59 users each during the same period. CMS allocated channels to these cells based on this semi-uniform methodology and assigned 15 voice channels to Cells 1 through 10 and 6 voice channels to Cells 15 through 23.[91]

33. CMS' first year system will also experience significant co-channel interference on control frequencies, specifically between cells 20 and 4 (both using control channel 326), cells 18 and 22 (both using control channels 328) cells 23 and 11 (both using control channel 323), cells 22 and 2 (both using control channel 328) and cells 1 and 21 (both using control channel 333).[92] CMS admits that there are areas in which common signalling channels are used in closely spaced cells and that reductions will occur in signalling channel coverage, but claims that a subscriber unit will be transferred to a different overlapping cell in those areas where co-channel interference exists. CMS concludes that system operation will not be affected by co-channel signalling interference because additional cell coverage allegedly will provide backup signalling capacity. However, CMS does not relate this general explanation to its Philadelphia proposal. Most significantly, CMS did not show the actual reduction in the effective coverage of the cells experiencing co-channel signalling interference. Absent such a showing, it is impossible to determine whether there are overlapping cells that can provide the channel coverage. Moreover, CMS does not address the effect that the use of additional cells for backup coverage will have on overall system capacity and the number of subscribers that a particular cell will be able to serve. Nor are details provided by CMS as to the operation of this claimed backup transfer procedure.[93]

34. MCI proposes to construct its initial first year system with cell sites and channels equipped to handle projected demand through the end of the second year of operation. For these years, MCI's system will have 21 sites, using directionalized, sectorized antennas in downtown area cells, and omni-directional antennas elsewhere.[94] MCI will also provide 538 voice channels, using a 7

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[91] AWACS Rebuttal Exhibit 5, p. 2; CMS Exhibit IV, pp. 12-13; Exhibit IX, Table 5.

[92] AWACS Rebuttal Exhibit 4, p. 13; Celcom Exhibit 16, p. 7.

[93] CMS Surrebuttal Exhibit I, pp. 21-22.

[94] MCI Direct Case Exhibit 41, pp. 2, 3; Exhibit 18, pp. 20-21. Cells which are sectorized employ multiple directional antennas, each serving a particular portion of the cell. Channels allocated to the cell are divided among the sectors. Thus, subscribers in a sectorized cell have available for their use the channels that are assigned to the sector they are in.

cell reuse pattern. These channels are designed to provide a 0.02 grade of service, based on the Erlang B traffic formula, and assuming a 144 second (.04 Erlang) holding time.[95] The switch and base station equipment for MCI's system will be manufactured by Anaconda-Ericcson and SRA Communications, a company associated with Anaconda-Ericcson.[96]

35. The 39 dBu contours proposed by MCI appear to encompass most of the Philadelphia SMSA's areas of high population density, high income and employment, and major highways described in its public need survey. By the admission of MCI's own engineer, however, MCI's 39 dBu contours exhibit shortcomings primarily in inter-cell gaps and contain some "inexplicable limitations for which there is no basis according to its demographic or Public Need Survey data or analysis."[97] Like CMS, moreover, MCI has failed to indicate how these demographic materials related to a specific user distribution for the Philadelphia area. Nor has MCI explained how it assigned channels to individual cells.[98] During its initial years of operation, MCI will experience co-channel interference on 8 voice frequencies as well as on the control channels of Cells 10 and 1.3. In addition, Cells 11 and 1.2 will experience co-channel interference on 4 voice frequencies and the control channel. MCI's system also contains numerous adjacent channel interference problems.[99]

36. *Ability to Accomodate Anticipated Demand for Roamer Service.* Celcom will offer service to two types of roamers: wireline subscribers located within the CGSA and subscribers to other systems located outside the CGSA. For the first group, Celcom intends to maintain an exchange of information with the local wireline system so that when the latter is saturated, it can switch to Celcom's system. In the case of subscribers to other systems located outside the CGSA who travel to Philadelphia, Celcom will provide service both to roamers initiating phone calls and to

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[95] MCI Direct Case Exhibit 16, p. 7; Exhibit 21, p. 18; Exhibit 38, pp. 8–13; MCI Rebuttal Exhibit 3, pp. 39–40.

[96] MCI Direct Case Exhibit 10, p. 2; Exhibit 18, p. 1.

[97] MCI Rebuttal Exhibit 1, pp. 19, 41.

[98] An AWACS Rebuttal Exhibit also indicates that MCI did not account for varying user densities in its channel assignment methodology. For example, MCI allocated 45 voice channels (15 in each of 3 sectors) to Cell 1, expected by AWACS' calculations to serve 1,064 users, 35 channels to Cell 5 (15 in each of 2 sectors and 5 in one sector), expected to serve only 556 users, and 26 channels to Cell 7 (6 in one sector, 7 in one sector, and 13 in one sector), expected to serve barely 200 users. AWACS Rebuttal Exhibit 2, p. 16.

[99] AWACS Rebuttal Exhibit 2, pp. 7–8, Attachment A, pp. 1-7; Celcom Exhibit 16, p. 10, Appendix C.

registered roamers to receive calls. In the case of the former, Celcom will provide service upon his making his initial call. A roamer wishing to receive calls may register either by notifying Celcom by telephone when he arrives in the CGSA or when he wants to make his first call in the CGSA, or by arranging to have his own system notify Celcom's system, and then receiving his number assignment. Celcom will also set aside numbers in its own system for the purpose of permitting a roamer to have a local number while he is in its CGSA and for the purpose of permitting calls to be forwarded from the roamer's home system. Finally, Celcom intends to establish a central computerized clearinghouse which will be available to all cellular operators. This clearinghouse will have 3 primary functions: (1) to forward calls; (2) to charge and credit the affected systems and their subscribers; and (3) to act as a credit-information clearinghouse.[100]

37. AWACS and MCI both propose use of the Anaconda-Ericcson central switch and will employ seven methods to insure effective service to roamers: (1) fully automatic registration with automated call forwarding; (b) fully automatic registration with local automatic temporary registration; (c) fully automatic registration with local manual temporary registration; (d) automatic origination, manual reception of calls; (e) wholly manual registration; (f) automatic call origination only, no call reception possible; and (g) manual call origination only, no call reception possible. Also, in appropriate circumstances, roaming service may be denied for commercial or administrative reasons. To use the automated mode on AWACS's system, the roamer's home system must have an inter-carrier agreement with the AWACS system. In the absence of such an agreement, roamers will be registered on a manual basis.[101]

38. Under CMS' roamer proposal, a foreign subscriber will be registered in the CMS Philadelphia system under the local number assigned to him in his home system. When a local Philadelphia caller wishes to contact the roamer, he will first dial a single, unchanging access number and, upon receipt of a second dial tone, dial in the foreign subscriber's "Home" system local number. In this manner, a foreign subscriber will always be reachable at the same access number and at his own mobile or portable number. CMS' proposal for roamer service includes fully automatic regis-

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[100] Celcom Direct Case Exhibit 9, pp. 1-4.

[101] AWACS Exhibit 1, "SRA System CMS 8800 Roaming Services Functions and Considerations," pp. 1-3; MCI Exhibit 17, pp. 11-15; AWACS Exhibit 6-H.

tration of roamers within CMS' system.[102]

*III. Issue (b)*

39. *Ability to Meet Anticipated Increasing Demand.* As noted, Celcom plans to phase-in its 16 cell, 375 channel system, commencing operations by the end of the first year after grant of its construction permit. Following construction of five initial cells in the central Philadelphia area, the order of construction will depend on demand indications generated by Celcom's switch and on the results of a user questionnaire.[103] By the end of the third year after grant of its permit, Celcom will have constructed all of its cells. Celcom gives no step-by-step expansion plan beyond its fourth year of operation, when its proposed system will be in service, except to note that more subscribers may be accomodated either by channel addition or channel borrowing. As noted, Celcom anticipates that it will probably need to modify its cell structure to accomodate portable users, and a different cell structure may also be needed to coordinate frequency use with cellular systems in other areas. Celcom will also increase the capacity of the interconnection network between cells and its switch and between the switch and the public wireline telephone network. Finally, system expansion may also include an expansion of coverage to serve areas within the CGSA, but not within the 39 dBu contours of the initial 16 cell system. Celcom will meet increasing demand by expanding when the blocking rate in any cell exceeds 5% on any 5 consecutive business days or on any 4 days in a 20 day period. Although Harris Corporation has assured Celcom that its central switch can provide such data daily, Celcom is silent on the frequency of either the retrieval or the evaluation of such data.[104]

40. As noted, although Celcom proposes a 7 cell reuse plan, its frequency group assignments do not appear to follow such a model, and both co-channel and adjacent channel interference can be expected in its system. Assuming, however, the viability of Celcom's plan, the frequency reuse ratio of the applicant's fourth year system would be 2.28 if the number of proposed cells were

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[102] CMS Direct Case Exhibit III, p. 11, Exhibit VI, pp. 4, 6–7; CMS Rebuttal Exhibit IV, p. 8.

[103] Celcom Exhibit 5, p. 4; Celcom Exhibit 6, pp. 3-5.

[104] Celcom Exhibit 4, pp. 2, 2; Celcom Exhibit 6. Celcom also proposes greater flexibility in its system through "dynamic channel reassignment." However, Mr. Coppage conceded at hearing that such a feature is not possible under the present state of cellular technology, and would, in any event, require the installation of additional transceivers (Tr. 261–263).

divided by a factor of 7. A more accurate method of determining reuse capability, calculated by dividing the number of proposed voice channels (375) by the number of those that are available (312), would yield a lower ratio of 1.2.

41. AWACS' expansion plan, like its initial system design, is based on Compucon's demand forecasts for the Philadelphia SMSA.[105] Beginning with its second year of operation, AWACS anticipates that voice channel requirements will exceed the capacity of its initial omni-directional plan, and the applicant will employ both sectorization, through the use of 120° sector antennas, and cell-splitting to accomodate projected subscriber demand. AWACS will also employ channel addition, frequency borrowing and overlayed cells to smooth the transition of its system. Within 5 years, the AWACS system will grow from 18 to 60 cells using 2,640 voice channels and, with two exceptions, sectorized antennas.[106] A second level cell-split, to commence in AWACS' seventh year of operations, would increase system capacity even further.[107] To implement cell division, AWACS will employ a 7 cell reuse pattern in which available channels are divided into 21 groups and 44 to 45 voice channels are assigned to each cell.[108] AWACS' frequency reuse capability after its first level cell-split, if derived by dividing the number of proposed cells (60) by a factor of 7, would be 8.55. If calculated by dividing the

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[105] AWACS Direct Case Exhibit 2, pp. 125–134, 144–155). AWACS premised its system design and expansion plan on the assumption that its service would commence in 1983.

[106] The number of voice channels in the AWACS system at the end of its first level cell-split can be determined by reference to pages 146, 152–155 of AWACS Exhibit 2. Page 152 shows there will be 60 cells under AWACS' first level split. Pages 153–155 indicate that each of these cells will be assigned 3 frequency groups, and page 146 shows that each frequency group will be assigned 15 voice channels, except groups 19–21, which have 14 channels each. Thus, each cell is assigned 44 or 45 voice channels. Assuming, for the ease of computation, that cells are assigned 44 channels, the total number of channels assigned in AWACS' system under the first level split is 2,640 (60 cells x 44 channels).

[107] *Id.* at pp. 156–159.

[108] *Id.* at 128–130, 146. Since AWACS will initiate service with a 24 group, omni-directional frequency plan, its switch to a 21 group sectored frequency plan will require some amount of returning so that certain transmitters in each cell can be assigned new frequencies. (AWACS Direct Case Exhibit 2, p. 145; MCI Rebuttal Exhibit 3, p. 32; CMS Rebuttal Exhibit III, pp. 24–27). Although MCI and CMS seek to portray this process of retuning as a major flow in AWACS' expansion plan, the record does not support this position. The basis retuning of voice and signalling channels using Ericcson equipment is a simple process requiring only a computer command from the central switch and can be accomplished in a fraction of a second. (AWACS Direct Case Exhibit 1, "SRA System 8800", Section 3, pp. 6, 17, 20–21; "AXE 10 Switching System APT210", pp. 93–127).

number of proposed frequencies (2,640) by a factor of 312, the ratio would be 8.46.

42. As noted, the design grade of service for AWACS' system will be 0.02. The basis of determining when sufficient congestion is encountered to warrant channel additions or cell splitting occurs when the measured performance of the cell with the heaviest traffic loading consistently approaches a grade of service of 0.05. The action to be taken will consist of modifying RF channel density to correspond to the user density which it serves. Cell-splitting will occur when this need to modify RF channel density requires frequency reuse cell subdivision because the existing system can no longer add or borrow channels to meet the service objective. In the actual system operation, user statistics by cell and for the overall system will be generated by the system software to provide a data base for the management of the system grade of service. The Ericcson switch which AWACS proposes will automatically provide information on traffic load, subscriber data base and blocking conditions in connection with all cells, trunks and switch addresses. Call blocking rates will be reported directly to management on a daily basis. Traffic data and load levels for each cell site will also be collected daily. In addition, the following information will be made available by the switch for each cell and for the entire system; total traffic; the number of call attempts by mobile or portable units; the number of service denials; average holding time for calls per cell; average number of blocked trunks; outgoing trunk usage; incoming trunk usage; the number of calls to queue, average call length; and mobile versus land originated traffic. AWACS intends to take immediate corrective action when, "over a period of several days or weeks," its grade of service objective is not met either in an individual cell or the overall system.[109]

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[109] AWACS Direct Case Exhibit 2, pp. 136-137; AWACS Direct Case Exhibit 6–L, pp. 2–3. Relying on an analysis of D/R(Distance between cells/Radius of cells) ratios, MCI contends that degrading co-channel interference will develop between certain cells in AWACS' expanded system. However, no basis for this conclusion is provided. Moreover, under Section 22.903(c) of the Commission's Rules, for the purpose of establishing the reliable service area of a station and performing interference studies, all cellular applicants must use procedures consistent with Section 22.504 and FCC Report No. R–6406, "Technical Factors Affecting the Assignment of Facilities in the Domestic Public Land Mobile Radio Service," by Roger B. Carey (Carey Report). The Carey Report does not adopt D/R ratios, but establishes as the point of comparison an applicant's proposed 39 dBu contours. MCI has failed to present sufficient and persuasive evidence to compel acceptance of an alternative technical standard not adopted by the Commission and potentially in conflict with expressly adopted standards. Relying on a theoretical technical publication which is not a part of the

43. According to CMS, the cell configuration which it has proposed for its initial system has been designed to accomodate forecast fifth year demand.[110] CMS has also developed a fifth year frequency plan in which the frequencies that will be assigned to individual cells in the first five years of system operation have been incorporated.[111] Within this framework, capacity in CMS' system will be extended through the addition of cells, power and antenna adjustments, and sectorization.[112] By its fifth year of operation, CMS will sectorize 14 of its cells and provide 1172 voice channels, employing a 4 cell reuse pattern in which 78 channels are assigned to each cell. Given these parameters, the frequency reuse ratio for CMS' system by its fifth year of operation if proposed cells are divided by a factor of 4 would be 5.75. If CMS' proposed channels are divided by a factor of 312, the reuse capability would decline to 3.75.[113] In this context, it should also be noted that, beginning with its fourth year, CMS has premised its channel demand projections on a 0.05 grade of service.[114] CMS' expansion criteria also mandate system review and action when the grade of service at any cell equals or exceeds 0.05 on 21 of the 30 preceding days.[115] System performance will be monitored continuously and, based on performance data pertinent to this review, *e.g.*, distribution of user traffic, subscriber mobility, call originations, average call duration, roamer requirements, *etc.*, system and per cell traffic load and grade of service will be calculated and cell capacity adjustments made. CMS will evaluate system performance and subscriber statistics,

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record, Celcom similarly argues that certain AWACS expansion cells will be impractical and unworkable since they have radio of a mile or less. (Celcom Rebuttal Exhibit 19, pp. 5-6). This claim is also inadequately supported. Moreover, it ignores the factor of cell antenna height, and fails to consider AWACS' use of overlayed cells, which permit an original cell site, prior to cell subdivision, to be retained without power reduction to primarily serve portions of the original cell not directly served by the new split cell. (AWACS Direct Case Exhibit 2, p. 144).

[110] Proposed Findings, para. 42. Consistent with this approach, CMS also claims that a portion of its 23 cells are effectively subdivided cells drawn from a multi-layered subdivision grid. However, CMS fails to identify these particular cells, and the site locations proposed by CMS fall on no readily discernible grid.

[111] CMS Direct Case Exhibit IV, pp. 10-18; Exhibit IX, p. 2.

[112] CMS Direct Case Exhibit IV, pp. 12-18, Exhibit IX, pp. 2-7; CMS Surrebuttal Exhibit, pp. 13-16.

[113] CMS Direct Case Exhibit IV, pp. 12-18, CMS Rebuttal Exhibit IV, pp. 1-4.

[114] CMS Direct Case Exhibit IV, pp. 12-15. CMS states that this figure reflects a "worst case scenario" and does not represent the applicant's intention to permit lessening of service quality during the fourth or fifth years. *Id.* at 13.

[115] CMS Direct Case Exhibit III, pp. 16-17.

however, only at 6 month intervals.[116]

44. As proposed, CMS' system expansion plan will involve the introduction of undue interference, limiting or restricting the use of needed assigned frequencies. According to Exhibit III of its Direct Case, which describes the considerations and methodologies employed in designing the CMS Philadelphia system, for a nominal cell radius of 11 miles, typical separation for frequency reuse is about 48 miles between cell centers if omni-transmit is involved on both ends, and 38 miles if both cells are using sector transmit.[117] An inspection of CMS' coverage map reveals, however, that by the fifth year of operation, several cells in CMS' system having the same frequencies will fall short of these standards. All but 5 of the cells on the edges of CMS' system are within 48 miles of each of the others, and all but two of these will use omni-transmit antennas. Likewise, CMS intends to reuse channels at sectored cells 1, 5, 9 and 13, yet cells 1 and 5 are only 11.3 miles apart, cells 1 and 9 are 9.7 miles apart, cells 1 and 13 are 9 miles apart, cells 5 and 9 are 20.9 miles apart, cells 5 and 13 are 9.5 miles apart, and cells 9 and 13 are 17.1 miles apart. All of these cells have radii of 11 miles or less.[118] If CMS sought to eliminate these problems by reducing cell radii, it could only do so by reducing its cell overlap or, possibly, its geographic area.[119,120]

45. As noted, MCI will construct its initial first year system with cell sites and channels equipped to handle projected demand through the end of the second year of operation. According to the applicant, this approach will ensure that the proposed system will have adequate capacity to serve any additional unanticipated demand.[121] Given the parameters of its system at the end of its second year, MCI's frequency reuse ratio will be 3.0 if the number of proposed cells is divided by a factor of 7. If the number of proposed channels on MCI's second year system is divided by the number of available channels (538/312), the frequency reuse capability would be 1.72. In lieu of specific channel plans, MCI

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[116] CMS Direct Case Exhibit III, 15–16,; Exhibit IV, pp. 2, 9–15.

[117] CMS Direct Case Exhibit III, p. 1, 20.

[118] Celcom Rebuttal Exhibit 16, pp. 1–3; CMS Direct Case Exhibit IX (map).

[119] In its proposed findings, CMS admits that, as a result of sectorization and other modifications in its system required by expansion, it will lose some of its original cell overlap. Para. 71.

[120] The above findings are consistent with the analysis of interference on the AWACS system, *supra*, since they are based not on D/R ratios, but on CMS' own criteria for cell spacing and on the fundamental principle that the spacing between cells should follow as uniform a pattern as possible to achieve optimal coverage with minimal intra-system co-channel interference.

[121] MCI Direct Case Exhibit 41, p. 2.

provides a 5 step methodology for system expansion: (1) addition of channels within baseline allocation; (2) addition of channels outside baseline allocation; (3) addition of sites; (4) conversion from omni-directional sector antenna; and (5) cell splitting. Step 3 is an alternative prior to Steps 4 and 5, and need not be initiated when moving from borrowing to sectorization.[122] Although MCI proposes to evaluate hourly traffic data on a daily basis and has proposed a 0.02 design grade of service, the applicant does not describe any procedures or standard for the determination of when expansion will be required or the threshold of service quality that will trigger exacting system evaluation.[123] By MCI's own admission, there are two questionable reuse situations which could result in co-channel interference problems and/or the restriction of cell service areas in its system. The applicant also concedes that one of its sectored sites will require an additional control channel, and that there are four cases where adjacent channels are used at geographically adjacent sites.[124]

## *IV. Issue (c)*

### *A. Service Offerings and System Features*

46. In addition to their basis telephone services, each of the applicants propose a variety of special enhancement features. These are as follows:[125]

| | *Celcom* | *AWACS* | *CMS* | *MCI* |
|---|---|---|---|---|
| *Basic Enhancement Features:* Call forwarding, call waiting, conference calling, and no answer transfer | Yes | Yes | Yes | Yes |
| Message Center | No | No | Yes | Yes |
| Automatic Answering Service | Yes | No | Yes | Yes |
| 911 Service | Yes | No | Yes | No |
| Emergency Alert Procedure with Centralized Bureau | No | No | Yes | No |
| Advanced Voice Message Storage and Retrieval | No | No | Yes | No |
| Vehicle Security Alert & Voice Scrambling | No | No | Yes | No |
| Direct Distance Dialing, Direct International Dialing, Credit Card Charging, 800 Cellular Operator Assistance | No | Yes | Yes | No |
| Least Cost Routing | No | No | Yes | Yes |
| Special Information Announcements | No | No | Yes | Yes |
| Direct Access to Data Services | No | No | Yes | Yes |
| Local Roamer Dialing | Yes | Yes | Yes | Yes |

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[122] MCI Direct Case Exhibit 21, pp. 18-23.

[123] MCI Direct Case Exhibit 41, p. 14; MCI Rebuttal Exhibit 4, p. 16.

[124] MCI Proposed Findings, para. 86, referencing AWACS Rebuttal Exhibit 4, pp. 7-8.

[125] CMS Direct Case Exhibit VI, pp. 2-4, 5-6, 10-11, 14-19, 20, Exhibit IX, p. 8; MCI Direct Case Exhibit 13, pp. 3-4, Exhibit XI, p. 11; Celcom Exhibit 1, pp. 5-7, Exhibit 13A, pp. 5-6; AWACS Direct Case Exhibit 1, "SRA System CMS 8800, System OPS", pp. 1-2; Exhibit 6C, pp. 4-5, Exhibit 6H, pp. 2-3, Exhibit 11, pp. 8-11.

| | *Celcom* | *AWACS* | *CMS* | *MCI* |
|---|---|---|---|---|
| Automatic Roamer Service | No | Yes | Yes | Yes |
| Portable Cell for Special Occasions | No | No | Yes | No |
| Priority Service During Emergencies | Yes | Yes | No | No |
| Automatic Emergency Alert | No | No | Yes | No |
| VIP Calling Provision for "Queueing" | No | Yes | No | No |
| Time Remind | No | Yes | No | No |
| Vehicle Locator Service | No | Yes | No | No |

Neither AWACS nor CMS has related their proposed service enhancements to the findings of their public need surveys. Celcom's public need survey indicates an interest among a majority of its respondents for only call forwarding, automatic redial, call waiting and telephone answering. MCI's public need survey and focus group sessions each addressed preferences for service features and attributes of service. The former showed a high interest for call forwarding, conference calling, automatic redialing, speed calling, 911 service, and call waiting.[126]

47. After an initial connection rate of $10.00 per unit, Celcom proposes a monthly fee of $40, for which customers will receive 100 message units of air time. One unit of air time is equal to one minute of use during business hours (7:00 a.m. to 7:00 p.m.) and 2 minutes of use during off peak hours. Beyond this allowance, customers will be charged 40¢ per message unit, billed at half-minute increments. Celcom will charge subscribers for both call initiation and call reception. Celcom will also impose a separate connection fee of $10 and monthly charge of $2.00 for each custom calling feature it offers (except for message storage and retrieval, which will cost $25 for installation and $1.00 per month). Celcom proposes a $2.00 fee for registration of roamers, which will include a temporary number assignment for in-coming calls. In addition, there will be a $2.00 per day charge for use of the number. All other charges will be billed at Celcom's tariff rate.[127]

48. AWACS has submitted a tariff with two service package classifications.[128] Subscribers to Basic Service will pay from $50 to $60 monthly for interconnected service to and from points in the entire service area. Budget Service subscribers will pay only for service in the traffic area in which they primarily operate.

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[126] Celcom Direct Case Exhibit 2, p. 7; MCI Direct Case Volume 3, App. 3, Section V, pp. 21-22.

[127] Celcom Direct Case Exhibit 13, pp. 2-6, Appendix A, pp. 14-16.

[128] AWACS will also charge $25-$30 per month for order processing, $150-$200 for installation of mobile units; and $18-$22 for unit maintenance. (AWACS Direct Case Exhibit 6-E, p. 25).

Subscribers choosing the Pennsylvania area code 215 traffic area will pay $40 to $50 per month, and those choosing the New Jersey area code 609 traffic area will pay $30 to $40 per month. Both services include 100 units of air time per month. Air-time units will be calculated on a scale ranging from one unit per minute of use during peak period through .85 of an air-time unit for off-peak daytime hours, to .50 of a unit at night and on weekends and holidays. Additional air-time units will cost 50¢. There is a provision for Budget Service subscribers to obtain occasional service in the other traffic area at $2 to $3 per day. Like Celcom, AWACS will charge users both for call initiation and call reception. AWACS will also charge users separately for call coming ($1-$2 monthly), dash dialing ($1-$2 monthly), conference calls ($2-$3 monthly), time remind ($2-$3 monthly), and VIP service ($10-$15 monthly). For roamers, AWACS has proposed three different rate levels, depending on the means of registration and credit authorization available. Where AWACS has an intercompany agreement with the subscriber's own service, and where facilities exist for automatic registration and automatic call forwarding, roamers will be charged $7-$9 for registration and $2-$3 per day. Where AWACS has an intercompany agreement, but where no facilities exist for automatic registration until the subscriber notifies AWACS of his desire to deregister, roamers will be charged $15-$20 for registration, and $2-$3 per day. Where AWACS has no intercompany agreement and where no facilities for automatic registration exist, a credit authorization charge of $5-$6 will be imposed. All roamer charges are subject to a 10% surcharge. AWACS has also advanced 2 specific plans for bulk resale of its service, including detailed charges and provision for bulk billing in data processing format.[129]

49. CMS will charge a monthly fee of $4.95 per unit for basic system access and has established a three-tier pricing structure for air-time consumption. During prime hours (weekdays, 7:00 a.m. to 8:00 p.m.), subscribers will be charged 13 cents for the initial 30 seconds of each call, and 2.5 cents for each additional 6 seconds. During evening hours (8:00 p.m. to 12:00 a.m. weekdays; 7:00 a.m. to 8:00 p.m. on weekends; and on recognized Federal holidays), the company will charge 9 cents for the first half minute, and 1.8 cents for each additional 6 seconds. The charge for night hours (12:00 a.m. to 7:00 a.m.) will be 6 cents for the initial 30 second and 1 cent for each additional 1/10 minute.

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[129] AWACS Direct Case Exhibit 6-C, pp. 4, 5, 25-34.

Optional services, such as call forwarding or call waiting, will cost $1.75 each, $4.75 for a package of four. CMS will also charge $3.00 for store and forward voice service, plus 5 cents per call minute; $3.00 for distant roamer service, plus a surcharge of 35 cents per minute; $3.00 for distant roamer service; and 12 cents for each information call.[130]

50. MCI proposes a fixed monthly fee of $15 for local subscribers, with air time charges of 25¢ per minute for peak hours (8:00 a.m. to 8:00 p.m. weekdays, except holidays), and 15¢ per minute for off-peak hours. Customers will be billed in one minute increments. MCI will not pass through message unit charges from the local telephone company to the subscriber. In additional to basic service, MCI will charge 15¢ per minute for call waiting, 25¢ per call for call forwarding, 25¢ per call for no-answer transfer, 30¢ per minute for conference calls, $1.00 per message for operator message assist, and 20¢ per minute for automated answering, voice retrieval, and customer announcements. MCI will offer service to roamers at $5.00 per day, or $20 maximum per billing period, subject to the same usage charges as basic subscribers. No charge will be assessed for direct access to intercity systems.[131]

51. *Personnel and Maintenance.* Celcom will rely on its parent company for overall direction of its system and essential service. Locally, its system will be headed by a General Manager responsible for system operation, to whom a Director of Sales and Marketing, Chief Engineer, Office Manager and Business Manager will all report. During its first year of operations, Celcom will have a technical staff of 3, a sales staff of 3 and a clerical staff of 4. By its fourth year after grant of a construction permit, Celcom will have a support staff of 42, including 11 technical personnel. In addition to its own staff, Celcom will subcontract for technical personnel as a backup, receive assistance from its equipment manufacturer, and, "if desirable", seek assistance from service organizations located in the CGSA.[132]

52. According to Paul Coppage, Celcom's Director of Corporate Development, Celcom's maintenance plans are keyed primarily to achieving its targeted grade of service. Celcom plans to achieve these goals by its choice of equipment, the response time it proposes, its methods for providing and staffing maintenance, and

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[130] CMS Direct Case Exhibit VI, pp. 23–24a. CMS' charges for subscriber services are on a send and receive basis. *Id.* at 23.

[131] MCI Direct Case Exhibit 13, pp. 13–6 through 13–10.

[132] Celcom Direct Case Exhibit 11.

special internal mechanisms Celcom will use to enable its employees and contractors to respond promptly to problems as they develop. Coppage states that Celcom selected Harris equipment for its system because of the redundancy (*i.e.*, duplication of equipment) built into Harris' system design, and the system's self-diagnostic and completely modular capabilities. With respect to response time, Coppage states that Celcom intends to classify failures by their importance and then gear response time based on that evaluation. Class One failures will require an immediate response, and Class 2 failures will require a response within 4 hours. Although Class One failures will include any failure resulting in an unacceptable grade of service, Celcom has not yet developed a list of classifications. Such a list will be posted at Celcom's central switch, which will be continuously manned, capable of distinguishing between failures, and will be equipped with alarms to notify personnel. Celcom's technical staff will receive two week training courses conducted by Celcom's parent and Harris Corporation. As a special feature of its system, Celcom states that Harris will provide a one year warrant on parts and labor on all equipment and will send personnel and/or parts to Celcom's system during the first year if necessary "on the next plane" after being notified of a failure. At the expiration of this warranty period, Harris will offer this feature to Celcom, which will contract for them at that time. Celcom will also keep in stock a supply of spare parts for modular replacement, starting with a 10% of stockage spare parts inventory. Finally, Celcom will have a modified mobile unit which will test cell sites once a month.[133]

53. AWACS proposes a first year staff of 46 full-time employees, augmented by 5 outside professional consultants and 2 outside service agencies. The administrative division will be headed by AWACS President William S. Gross, who will devote a majority of his time to day-to-day operation for at least the first 6 months of operation. Operationally, AWACS will be divided into an administrative division; a service division for customer relations and complaints, staffed by a supervisor and one representative for every 1,000 subscribers; a sales division of 9 (including one supervisor); an accounting division of 2; an operators' division of 10 (including a Chief Operator); and a Technical Division headed by a Chief Engineer and staffed by 3 central switch engineers, 3 cell site engineers and 2 bench technicians.[134]

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[133] Celcom Direct Case Exhibit 8.

[134] AWACS Direct Case Exhibit 6-D.

54. AWACS' central switch will be staffed 24 hours a day by its engineers, who will be responsible primarily for routine maintenance and repair of switch equipment. Periodic tests and inspection of the central switch will be conducted daily to detect and repair malfunctions, and routine maintenance will be performed. The switch itself will be modular, self-diagnostic, and equipped with spare parts and emergency power. AWACS' three cell site engineers will perform routine maintenance of every site in AWACS system every 30 days during off-peak hours. Each technician will operate a mobile vehicle equipped with test equipment and spare parts, and will be dispatched immediately to sites when complications develop. A complete inventory of spare parts for each site will also be maintained, and each site will have battery back-up for 24 hour emergency service, with alarms for main power and equipment malfunctions. AWACS' 2 bench engineers will be responsible for basic electronic equipment and parts repairs required by staff engineers. The AWACS technical staff will also periodically review several statistical indicators on system performance as part of its preventative maintenance program. The system's central switch will be protected by security personnel and a HALON gas fire extinguishing system.[135]

55. CMS' Philadelphia cellular system is one of a series proposed by Graphic Scanning in all the top 30 SMSA's. The activities of these subsidiaries will be overseen and coordinated by CMS' corporate parent, Systems, which will also provide a broad range of technical, marketing and management support. Corporate resources and personnel of both Systems and Graphic Scanning will be drawn upon to complement and enhance the capabilities of the local operating Staffs. The officers of CMS[136] are also officers of Systems and/or Graphic Scanning. The record is silent as to whether any of these individuals will devote any time to day-to-day administration and maintenance of the Philadelphia system. For its first year of cellular operations, CMS proposes a staff of 48 persons, whose positions will be allocated among the areas of network operations, maintenance, engineering, sales and customer service, and finance and administration. Supplementing

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[135] AWACS Direct Case Exhibit 6-F.

[136] These individuals are: William S. Wheatley, President; Richard J. Sherwin, Vice President, Sales and Customer Service; Alan K. Ganschow, Vice President, Operations; J. Douglas Wells, Vice President, Technical Services; Robert Slodowitz, Vice President, Finance and Administration; and Stanford B. Weinstein, Vice President, General Counsel and Secretary. CMS Direct Case Exhibit I, p. 1.

the marketing staff will be 30 individuals provided by minority and/or female agencies which CMS will assist in establishing as resellers of its cellular system.[137]

56. The structural framework of CMS' maintenance plan calls for a cellular system general manager, a supervisor for technical operations, a radio frequency (RF) maintenance staff composed of Commission licensed radio technicians and a digital maintenance staff comprised of switch technicians. However, nowhere in its direct case does CMS specify the size of its local technical staff. All technical personnel will receive training prior to implementation of the cellular system, and will participate in on-going training programs thereafter.[138]

57. CMS' mobile exchange switching center will be staffed 24 hours a day by qualified technical personnel. A complete system status evaluation encompassing all major hardware and software elements, will be conducted daily through diagnostic routines. Failures will be detected through alarm messages and diagnostic printout on a local teleprinter, and will be serviced immediately. The exchanges are capable of localizing failures to a board level. Local spare stock will be maintained for all critical units, including redundant items.[139] Cell site equipment will be tested by daily diagnostic routines through the capability in the base site controller at each cell site. In addition, continuous test routines will be run at each base site controller automatically. Failures at cell sites will be immediately relayed to the mobile exchange where they initiate alarms and diagnostic printouts. Faulty modules will be removed from service automatically when alarms conditions occur, and modules can also be deactivated on command from the exchange. All cell site alarms which result in a deterioration of the grade of service will be served immediately; all others will be serviced within 2 hours. Cell sites will be attended from the service centers.[140] As a further maintenance feature, CMS, through Graphic Scanning, will provide a "Dial-Up Emergency Transfer" (DUET) and Control System which will utilize the switched telephone network to rest and, when necessary, to operate remotely located equipment normally operated

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[137] CMS Direct Case Exhibit I, pp. 1-2; Exhibit VII, pp. 1-4; Appendices VII-B and VII-C; Appendix I-A.

[138] CMS Direct Case Exhibit VII, Appendix VII-D, pp. 20-21, 25-27, Figure 6.

[139] CMS Direct Case Exhibit VII, p. 5. For its initial year of operation. CMS has incorporated redundancy into its central switch and 14 of its key sites, including base site controllers and signalling channels. CMS Direct Case Exhibit IX, Tables 2, 3.

[140] CMS Direct Case Exhibit VII, p. 5.

over designated facilities.[141] CMS will also provide full auxiliary power to ensure no loss of service in case of main power failure. The control point and key sites will be supplied with standby generators with sufficient fuel for two days of continuous operation. Smaller sites will be supplied with battery equipment adequate to ensure full power operation.[142]

58. CMS will have access to a central organization, the Cellular Network Customer Services Bureau (CNCSB), which will handle the control and quality of service provided by Graphic Scanning affiliated cellular systems throughout the country. The CNCSB, staffed 24 hours a day, will serve as a repair depot, and will maintain a pool of specialized test equipment which will be available to any operating system when required. Further, the CNCSB will provide trouble analysis and repair to systems requiring assistance.[143]

59. MCI's Philadelphia maintenance staff will initially consist of 25 technical and support personnel in two groups,[144] all of whom are currently employed by MCI's parent in its existing Philadelphia operations. Their cellular operations responsibilities will be in addition to their existing responsibilities. Should additional technical staff be required, MCI will draw on its existing pool of technicians through transfer from other MCI facilities, and upon technicians employed by Airsignal. For the indefinite future, MCI will also rely on its existing facilities for sales and customer service.[145]

60. MCI proposes to man its central switch 24 hours a day, 7 days a week. Inasmuch as MCI will be co-locating the switch with its long distance switch in Philadelphia, MCI's existing technicians will maintain the switch as part of their normal routine installation, operation and maintenance duties.[146] MCI will also

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[141] CMS Direct Case Exhibit VI, p. 20.

[142] CMS Direct Case Exhibit IV, pp. 6-7, (Exhibit IV (A), p. 3, Figure II), Exhibit IX, Table 2.

[143] CMS Direct Case Exhibit VII, Appendix VII-D, pp. 20-24.

[144] MCI's 25 person technical staff responsible for maintaining MCI's switch and terminal facilities, will be supervised by Operations Manager Rich Robinson. To maintain its central switch, MCI proposes to have one manager, one console operator and two switch specialists during the business day shift and one per shift during non-business hours. MCI has assumed that base station maintenance will require one manager and one technician for each 6 cells. MCI Direct Case Exhibit 32, p. 5, Exhibit 33, pp. 1-2.

[145] MCI Direct Case Exhibit 7, p. 5, Exhibit 14, p. 12, Exhibit 32, p. 5, Exhibit 33, pp. 1-2. MCI proposes to draw on its in-house training capability to recruit and train required personnel. MCI Direct Case Exhibit 4, pp. 18-20; Exhibit 3, p. 5.

[146] MCI Direct Case Exhibit 10, p. 3; Exhibit 32, p. 5; Exhibit 33, p. 1.

make available on a 24 hour a day basis specialists for base station maintenance. During their inspections, these specialists will check output power, voltages and currents, receiver performance and battery condition, and confirm that all equipment meets Commission and FAA regulations. The base station technicians will be furnished with a range of test equipment able to measure and analyze the basic parameters of the equipment. A full complement of manufacturers' recommended spare parts will be maintained at MCI's Philadelphia control center to support both preventive and corrective maintenance activity.[147]

61. MCI will provide integrated maintenance and repairs from a Cellular Network Management Center (CNMC) in Philadelphia. The CNMC — a fully computerized network system that works in conjunction with the Ericcson switch — will be co-located with MCI's Mobile Telecommunications Switching Office (MTSO) and will interface with the MTSO, base stations and administrative host processing system for traffic engineering as well as for administrative management and billing systems. The MTSO and base stations are equipped with alarms and status indicators that are controlled remotely from the CNMC, allowing visibility and control over the cellular system from this locally situated center. The CNMC will be staffed 24 hours each day, with a manager and operations personnel during 3 eight hour shifts. Maximum staffing is planned during the busiest traffic hours of 6 a.m. to 10 p.m. on weekdays. An MTSO maintenance specialist and a base station maintenance specialist will be employed for each shift. In addition, a CNMC supervisor and a network analyst will be scheduled to work during the first 2 shifts. Unscheduled maintenance will be handled by MTSO or base station maintenance specialist during all shifts. In the event a major system problem arises and further assistance is required, standard maintenance and repair procedures, which require call-out for specialists, will be in effect so that on-call personnel will be immediately dispatched to the MTSO or base station site.[148]

62. *Practices*. Celcom proposes an equal employment opportunity program, which includes a program for contacts with minority, veterans, handicapped and women's groups, for advertising in Philadelphia minority owned publications, and for a minority internship program. Celcom also intends to provide its portable subscribers with a mail-in questionnaire to be included with their monthly bills for the purpose of eliciting information

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[147] MCI Direct Case Exhibit 20, p. 8, Figure 20-A.

[148] MCI Direct Case Exhibit 20; Exhibit 40, p. 5.

about customer problems.[149]

63. AWACS also plans to adopt and implement an equal employment opportunity program before it hires its staff. In addition, AWACS has proposed a complaint procedure, incorporating a 24 hour technical and general service number and a mechanism for handling complaints. Initially, customer complaints will be handled by one of the 10 service representatives to be employed by AWACS. If a preliminary inquiry by this representative fails to locate the technical problem, the agent will then transfer the matter to the service supervisor, who will then present the issue to the Chief Engineer, if necessary. AWACS has also recruited a system of authorized resellers, which will commence operations at 12 resale locations located throughout the SMSA.[150]

64. CMS' ultimate corporate parent, Graphic Scanning, has established a plan to fund the creation of at least 3 local minority and/or female controlled organizations to engage both in retail and service functions with respect to marketing CMS' cellular service, and in the sale, rental, service and installation of consumer mobile telephone equipment. Graphic Scanning has agreed to invest up to $3,000,000 for the establishment of these businesses in the top 30 cellular markets, $100,000 of which has been allocated to the Philadelphia market. In addition, Graphic Scanning has entered into an agreement with Atalanta Investment Company, Inc., a federally licensed small business investment company, pursuant to which Atalanta will invest $3.00 for every dollar which Graphic Scanning invests.[151]

65. CMS also proposes to reserve a position on its Board of Directors for a Consumer Affairs Representative. In addition, CMS will maintain a customer service center which will be accessible by toll-free telephone lines. CMS personnel manning this center will record questions and complaints and direct all inquiries to the pertinent departments with a response due back within a specified, abbreviated period of time. CMS' customer service organization will be supported by the customer and

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[149] Celcom Direct Case Exhibit 1, pp. 9–10; Exhibit 12. Celcom also seeks comparative advantage for various marketing practices it intends to implement. These proposals need not be described since they are irrelevant to the issues specified in this proceeding and are not encompassed by the comparative analysis described in the Commission's *Report and Order, supra.*

[150] AWACS Direct Case Exhibit 6–D, p. 7; Exhibit 6–F, pp. 11–22; Exhibit 6–I.

[151] CMS Direct Case Exhibit VII, p. 6, Appendix VII-F. Pursuant to the Commission's *Report and Order, supra*, the sale, rental service and installation of subscriber equipment is irrelevant to the comparative issues in this proceeding.

community relations division of Systems, which will operate a 24 hour a day/365 days per year hot line to respond to subscriber difficulties. CMS will also promote the resale of its cellular service.[152]

66. Unlike its rivals, MCI has made no specific provision for encouraging minority participation in its cellular system operations or marketing. MCI intends to establish an On-Line Customer Service System to handle customer inquiries, trouble reports and credit requests. Complaints of a technical nature will be relayed by this organization to MCI's CNMC for evaluation and corrective action. MCI will also promote the resale of its system, but has not yet finalized the specific details of its resale plan.[153]

67. *Facilities*. As noted, *supra*, Celcom proposes to use a central switch and cell site controllers to be supplied by Harris Corporation. The equipment will have redundant capabilities (*i.e.*, duplication of certain key pieces of equipment), modularity, and diagnostic features. The Harris equipment will provide redundancy for cell site paging transmitters and locating and access receivers. Self-diagnostic equipment will be installed at the cell sites, and interconnection of the cell sites to the central switch will be redundant.[154]

68. AWACS and MCI have both proposed to use the Anaconda Ericcson central switch and base station equipment manufactured by SRA communications, a company associated with Anaconda Ericcson. Both transmitters and receivers for the proposed systems can be configured for a wide range of cell sites. Additional transmitters and receivers can be added individually as channel requirements increase, while either direct or diversity reception is available. A control unit, associated with the transmitters and receivers, is responsible for the signalling procedures between the base station and switch, the control of the transmitters and receivers, and the faulty monitoring of the base station equipment. The SRA system permits the connection of up to 16 transmitters and receivers to a common antenna, and the equipment is fully compatible with the RF and signalling formats of Part 22 of the Commission's Rules. The Anaconda Ericcson switch is fully automatic and modular, providing for centralized operation and maintenance functions, with a switch including

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[152] CMS Direct Case Exhibit VI, p. 26; Exhibit VII, p. 4, Appendix VII-D, pp. 21-23.

[153] MCI Direct Case Exhibit 12, p. 14; Exhibit 13, p. 11; Exhibit 14, pp. 20-22.

[154] Celcom Direct Case Exhibit 7.

self-contained diagnostic functions.[155]

69. As noted, CMS will utilize the Motorola EMX Mobile Telephone Exchange (EMX) as its central switching facility. This switch includes full processor control, redundancy, self test and diagnostic capability, subscriber service features, call sorting and routing, interconnect capabilities, statistical analysis of system operation, and other features.[156] Motorola DynaTac Base Site Controllers and RF equipment will be installed at high density cells on CMS' system (Cells 1 through 14), while low density cells (Cells 15 through 23) will be equipped with equipment manufactured by Graphic Scanning and E. F. Johnson. Both types of equipment contain self-test and diagnostic capabilities.[157]

## *CONCLUSIONS*

### *Issue (a)*

70. Issue (a) calls for a comparison of the geographic areas[158] which the applicants propose to serve, the relative demand for service in those areas, and the ability of each applicant's system to accomodate the anticipated demand for both local and roamer service. The Bureau, in ruling that the geographic area to be served is a major factor of comparison, directed that consideration should be given to the presence of densely populated regions, highways and areas likely to have high mobile usage characteristics as well as indications of a substantial public need for the services proposed, including the results of public need surveys.[159] Under this issue, AWACS deserves a moderate comparative preference.

71. *Geographic Area and Population.* A comparison of the applicants' 39 dBu contours is difficult in this case since no single applicant is superior in all respects. AWACS' proposed composite coverage will clearly encompass more square miles than those of the other applicants, nearly 83% of the Philadelphia SMSA. The contours of Celcom, CMS and MCI will cover only 79.6%, 77.6% and 76.7%, respectively. In other respects, however, the 39 dBu coverage of AWACS is clearly inferior. Though its proposed

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[155] AWACS Direct Case Exhibit 11, pp. 1-8; MCI Direct Case Exhibit 17, Appendix 17-D; MCI Direct Case Exhibit 18, pp. 1-2.

[156] CMS Direct Case Exhibit III, p. 8; Exhibit IV, pp. 3, 6; Exhibit IX, Table 2.

[157] CMS Direct Case Exhibit IV, pp. 3, 6; Exhibit IX, p. 3.

[158] For purposes of comparison, the geographic area that an applicant proposes to serve includes that area within the proposed 39 dBu contours which, in turn, falls within the proposed CGSA and the relevant SMSA. *Memorandum Opinion and Order*, 48 Fed. Reg. 3862, at para. 41(c), n.16.

[159] *Id.* See also *Cellular Communications Systems*, 86 FCC 2d at 502.

geographic area is smaller than those proposed by two other applicants, the composite contours of CMS' system encompass some 48,000 people more than AWACS, 58,000 more than Celcom, and over 86,000 more than MCI. Together with Celcom, CMS will also provide superior highway coverage to users. Although both applicants will miss approximately 688,000 potential highway users, the average annual daily traffic volume missed by MCI (961,700) and AWACS (1,096,100) will be significantly greater. An analysis of the exclusive "pockets" of coverage proposed by the applicants also shows that, although the "pockets" proposed by AWACS are generally superior to those of MCI and Celcom, they are inferior to those of CMS. Specifically, the areas which CMS will exclusively serve contain a high population, more business, employees and high income households, and will generate more users, by AWACS' own estimation. In light of the superiority of its coverage in all material respects except square mileage, CMS will receive a comparative preference under this aspect of Issue (c). This preference will be slight, however, since all the applicants propose to serve the bulk of the Philadelphia SMSA, including most major population, employment and traffic corridors and at least 95% of the area population.[160]

72. *Relative Demand for Service.* In developing its requirement for applications for cellular authority, the Commission expressly found a public need for cellular service, and dispensed with application showings of need. It did, however, include in its comparative criteria a consideration of the showing of the particular extent of the demand for cellular service in individual markets.[161] In comparing the applicants, a market study is, indeed, of crucial importance, since it serves as the basis upon which a cellular system is designed. The comparison of public need focuses on the methodologies utilized by each applicant in ascertaining demand and the specific level of need.[162] Evaluation of the basis, if any, by which the projected demand has been allocated to areas within the SMSA for technical design purposes

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[160] While AWACS is unique in its coverage of the Garden State Parkway, the general inferiority of its highway coverage is exacerbated by the stand-alone nature of the New Gretna cell, which covers this artery. Because of the isolation of this cell, handoff of communications between it and the rest of AWACS' system is likely to be unreliable.

[161] *Cellular Communications Systems*, 86 FCC 2d at 502, 503.

[162] *Houston Mobilfone, Inc.*, 65 FCC 2d 848, 859-860 (Rev. Bd. 1977), *review denied*, FCC 78-477 (July 11, 1978), *remand Mobilfone Service, Inc.* v. *FCC*, 605 F. 2d 572 (1979), *affirmed Houston Mobilfone, Inc.*, 78 FCC 2d 1067 (1980).

is also integral to such an analysis.

73. Each of the applicants has conducted subscriber research to determine relative demand for cellular service in the Philadelphia SMSA, and each has formulated an estimate of the number of subscribers anticipated during the first years of operation. The analysis provided by AWACS, however, is significantly more reliable, and entitled to a substantial comparative preference. AWACS conducted three detailed and comprehensive surveys in the Philadelphia SMSA, encompassing both potential business and residential users. The MARC questionnaire, on which AWACS' demand projections are based, contained all the information necessary to establish its reliability. Proposed rates, types of service, and area of service were adequately described. AWACS was also the only applicant to set forth in explicit detail the methodology and assumptions by which it forecast the specific year by year demand for the first 11 years of operation.[163] Finally, AWACS' market study also presented a vast amount of demographic data and user profile material uniquely specific to the Philadelphia SMSA and then analyzed each census tract in order to identify the localities where the projected demand would develop. None of the other applicants even attempted to ascertain and localize the demand in this manner.

74. By contrast, the Celcom public need showing is patently defective. Celcom's entire analysis rests upon a survey of 75 businesses in Philadelphia, 44 of which are so broadly classified that it is impossible to determine the representativeness of Celcom's sample. Neither the questionnaire used for this study nor the information which Celcom gave to respondents regarding cellular service has been provided. In any event, Celcom's own market research played no part in its determination of projected demand in Philadelphia and, by the applicant's own admission, was not intended to be a statistically valid study. Although Celcom relied on its mobile marketing experience, data from industry sources, and Mr. Coppage's experience to determine the projected number of users, the record fails to reflect the methodology by which Celcom's specific projections were derived. Further,

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[163] Although AWACS' forecast is based on certain unproven assumptions, such as that potential cellular users will be primarily businesses, these premises and Compucon's methodology are all explicitly stated and appear to be reasonable. In this context, Compucon's use of different assumptions regarding monthly costs and market penetration rates in its New York cellular market survey in no way vitiates the results of its Philadelphia analysis. It is precisely because no two markets are exactly alike that discrete studies of particular markets must be conducted and are likely to differ.

no attempt was made by Celcom to distribute even these unsupported projections throughout the SMSA. By any standard, Celcom's market study must be judged so grossly inadequate that it does not warrant comparative consideration.

75. Although CMS' research represents a more extensive undertaking, it too is severly flawed. CMS' greatest deficiency is its failure to establish a nexus between the findings of its market studies and its projections of demand and demand distribution. It is unclear, for example, how the six studies which CMS has submitted, each indicating a different level of need for cellular or paging service, support CMS' projected need of 4,254 subscribers.[164] Without further explanation of its calculations and operating assumptions, this figure is meaningless.[165] CMS also fails to explain how it used data on household densities, employment and traffic patterns to project models of cellular usage. This claim would appear to be inconsistent with the semi-uniform user distribution model on which its channel plan appears to be based. CMS' research also rests on certain dubious assumptions which prejudge the nature of the Philadelphia cellular markets. For example, because of the nature of cellular service, a two-way communications system, demand characteristics for this service may well be different than those found in paging services. Yet the identification and linkage of paging with cellular radio is an underlying assumption of CMS' research and serves as the ultimate basis of its demand projection. CMS' assumption that there exists a consistency of demand for cellular radio among markets is equally questionable. This assumption is stated explicitly in the Claritas study, in which apparently no Philadelphia SMSA businesses were surveyed, and is implicit in the Westat Report, where data from interviews in all top 30 SMSA's were combined. It also appears to be the basis for CMS' ultimate demand projection, which rests on a categorization of the top 30 SMSAs into three ranges of need. CMS' reliance on this assumption raises serious doubts as to whether its demand projections rest on an in-depth examination of the Philadelphia market, or on

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[164] CMS' demand projections do not appear to consider the presence of a wireline carrier in Philadelphia.

[165] CMS' demand projection is troubling for other reasons as well. For example, it is unclear why CMS based its projected demand figure on Philadelphia's general population since all six of the CMS studies are surveys of businesses.

national generalizations of unknown relevance to subject SMSA.

76. MCI's demand showing is comparatively superior to CMS's, but nevertheless suffers from major inadequancies. To its credit, MCI did not prejudge the nature of the Philadelphia cellular market by interviewing business establishments only. However, MCI failed in its primary survey of individual wage earners to ask the crucial question as to the authority and ability of respondents to indicate their firm's willingness to purchase cellular service. MCI also deserves credit for applying an Intent Translation Scale to develop a more reasonable estimate of cellular demand for the Philadelphia area. However, this credit must be diminished by MCI's failure to describe in detail how it derived from its projection of "realizable demand" (63,100) its actual demand projection of 3,000. Even assuming that these figures are valid, MCI, unlike AWACS, made no attempt to distribute its projected demand to geographic areas within the SMSA in order to provide fundamental design information.[166]

77. *Ability to Accomodate Anticipated Local Demand.* AWACS is also entitled to a moderate preference based on the ability of its system to accomodate local first year demand. AWACS' technical design is based on its superior public need showing, which was instrumental in the initial placement of a cellular grid over the SMSA for the initial selection of cell sites, in sizing the cellular system, in evaluating channel requirements, and in developing an expansion plan. None of the other applicants conducted such an in-depth and detailed analysis, integrally relating technical design to demographics, in the design of its system. AWACS' 39 dBu contours appear to cover most of the territory defined by Compucon as an area of high potential cellular usage, and its cells appear to be located as close as possible to an idealized call grid. Moreover, the system will experience no co-channel interference. The superiority of AWACS' system design is diminished only by the stand-alone nature of the New Gretna cell, and by AWACS' own admission that there are a limited number of cases where adjacent voice channels are proposed in its system in its system at geographically adjacent cell sites an potential handoff situations. Given these shortcomings, AWACS' preference under this aspect of Issue (c) will be moderate.

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[166] MCI is entitled to no comparative credit for its focus group sessions, which were conducted outside the Philadelphia SMSA.

78. The ability of Celcom's proposed system to accomodate initial demand is decidedly inferior. Although Celcom's plan for phased-in operation is meritorious in that cellular service in Philadelphia will commence quickly, it is by no means certain that the Commission will grant Celcom the special temporary authority it will need to begin operations.[167] Moreover, the capacity of Celcom's system to serve projected demand for its first three years of phased-in operation is unverifiable, since no details are provided as to these initial configurations. Once fully constructed, Celcom's system will embody other serious shortcomings as well. Although Celcom projects 11,900 subscribers in its fourth year of phased in operation (the first year of operations for its fully constructed system), its system is configured to serve only 11,400 subscribers. Thus, Celcom will be unable to accomodate projected demand. Celcom has also conceded that its system will require reconfiguration during its third year of operations in 1986, and that individual cells, or the entire system will probably have to be redesigned, in order to accomodate the needs of portable units. Finally, the frequency group assignments in Celcom's system do not appear to follow the standard 7 cell reuse plan, and co-channel interference will indeed occur between two of its cells. There are also two cases where adjacent signalling channels will be used at adjacent cell sites in potential hand-off situations, and numerous situations where one or more adjacent voice channels are used at adjacent sites. As a result of these problems, it is likely that Celcom's system will experience significant disruption.[168]

79. Like AWACS, CMS claims to have based its system design on its public demand research.[169] If that is true, the deficiencies found in CMS' forecasts, *supra*, would erode its engineering proposal as well. It appears, however, that CMS' market surveys were not used to determine where Philadelphia cellular users would be located. Instead, CMS' system design is based on a rigid distribution model which ignores key differences in potential usage throughout the SMSA. CMS relied on a semi-uniform

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[167] The Presiding Judge is aware that the Commission has stated that an operator may phase in service once its initial facility is in place. *Cellular Communications Systems*, 89 FCC 2d 58, 86 n. 44 (1982). This allowance, however, does not appear to supersede the requirements of Section 22.25 of the Commission's Rules.

[168] Celcom's 0.05 grade of service is also inferior to that proposed by AWACS.

[169] CMS' proposed 39 dBu contours will, as noted, cover areas in the Philadelphia SMSA having high household density and high densities of upper income households.

distribution methodology for localizing demand and assigning channels. This procedure inflexibly allocates demand and does not incorporate variances in subscriber usage projections. Such a faulty methodology precludes any reasonable finding that CMS will provide consistent system-wide grade of service.[170] CMS' system also includes substantial co-channel interference on signalling channels between 5 pairs of cells, which will prevent effective hand-off. CMS' attempt to discount this co-channel interference based on the overlap of additional cells in its system is unavailing. CMS' theoretical explanation for the avoidance of such interference is in no way related to the specific operation of its system. CMS readily admits that this interference will reduce the coverage areas of the affected cells. However, CMS provides no assessment of the impact that such interference will have on system operation. Nor does CMS provide any details as to how this procedure will work or how the design of its system incorporated the use of overlapping cell capacity to insure effective signalling channel usage.

80. MCI's ability to accomodate initial local demand is also inferior to AWACS. Although the 39 dBu contours proposed by MCI appear to encompass most of the Philadelphia SMSA's areas of high population density, by the admission of its own engineer, MCI's contours exhibit shortcomings in intercell gaps and contain inexplicable limitations for which there is no basis according to its demographic or public need survey data or analysis. MCI likewise fails to indicate how its public need showing related to a specific user distribution for the Philadelphia area, or how it assigned channels to individual cells. During its initial years of operation, MCI's proposed system will suffer from substantial levels of co-channel and adjacent channel interference. MCI's frequency plan includes co-channel interference on a total of 12 voice frequencies and 2 control channels and will suffer significant adjacent channel interference in adjacent cell sites. This interference will seriously reduce MCI's system capacity and ability to accomodate its projected demand.[171]

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[170] Although the grade of service proposed by CMS (0.01) for its initial operating year is higher than that proposed by AWACS, it is impossible to adequately compare the applicants on this basis since AWACS has based its grade of servic eon a more conservative traffic model and assumed a longer holding time.

[171] Although MCI and AWACS propose the same grade of service, it is impossible to compare the applicants on this basis since AWACS has assumed a more conservative traffic model and MCI has assumed a longer holding time.

81. *Ability to Accomodate Anticipated Demand for Roamer Service.* CMS and MCI will each be accorded a slight comparative preference for their proposals to accomodate anticipated roamer demand. Under CMS' proposal, the foreign subscriber registered in the Philadelphia system could be reached by a single, unchanging access number followed by the foreign subscriber's home system number. Under the proposals of MCI, Celcom and AWACS, however, a foreign subscriber, upon registration in the Philadelphia system, would be assigned a temporary directory number. As a result, callers in Philadelphia who wished to contact the roamer could do so only after securing the roamer's temporary number from the foreign subscriber or a system operator. Since CMS' approach would minimize this inconvenience to both the foreign and local subscriber, some credit is deserved. However, the credit accorded to CMS will be slight since the inconvenience of the other approaches is a minor one. Moreover, unlike MCI and AWACS, which will have the capability to provide 7 different roaming functions, CMS apparently proposes only one. Although the AWACS system will have access to the same roaming functions as MCI no comparative credit will be given since AWACS will limit automatic registration to those roamers whose home systems have an inter-carrier agreement with it. Since Celcom fails to provide in any form for fully automatic registration, it too will receive no comparative preference under this aspect of Issue (a).

*Issue (b)*

82. The second major issue for comparative consideration is each applicant's proposal for expanding its system capacity in a coordinated manner for local and roamer service. In making this comparison, the Bureau directed in its designation order, "preference should be given to designs entailing efficient frequency use, including not only the applicant's plans with regard to cell-splitting and additional channels, but also the degree of frequency reuse the system will be capable of, and the applicant's ability to coordinate the use of channels with adjacent or nearby cellular systems."[172] AWACS will receive a moderate preference under this issue.

83. AWACS' expansion plan is based on its superior public needs showing, *supra*, and contemplates the use of all available

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[172] Designation Order at note 17. See also *Report and Order*, 86 FCC 2d at 502-503.

expansion techniques during its first 11 years of operation. AWACS will initiate service in an omni-transmit configuration, and will progress to a sectorized configuration with new cells added through the use of cell-splitting. The plan envisages orderly transition from one stage of cellular design to another. Neither co-channel nor adjacent channel interference is likely to occur in AWACS' system and, from the second through the eleventh years of operation, AWACS will provide the highest level of frequency reuse of all the applicants. The only weakness in AWACS' expansion proposal is its plan for evaluating and monitoring system traffic congestion. Although AWACS proposes a 0.02 grade of service, the basis of determining when sufficient congestion is encountered to warrant channel additions or cell splitting will occur only when the measured performance of the cell with the heaviest traffic loading consistently approaches a grade of service of 0.05. Moreover, AWACS intends to take immediate corrective action only when, over a period of several days or weeks, its grade of service objective is not met. In light of AWACS' apparent willingness to allow significant congestion in its system before taking corrective action, its otherwise substantial preference for expansion will be diminished to one that is moderate.

84. Despite its shortcomings, the expansion plan of AWACS is clearly superior to those of its competitors. Celcom has presented an incomplete and disorganized proposal for expanding its system. Permeating all aspects of Celcom's technical proposal is its failure to justify any of its design decisions through valid projections of overall or cell-by-cell subscriber demand. Celcom also fails to provide a step-by-step expansion plan beyond its fourth year of operation, when its proposed system will be in service, except to note that more subscribers may be accomodated either by channel addition or channel borrowing. Although Celcom proposes to monitor its system, its grade of service is lower than those of the other applicants, it is silent on the frequency of its evaluation or the actual corrective steps to be taken and it too, like AWACS, will permit significant congestion for a specified period before taking action. Celcom's system will have only minimal frequency reuse capabilities with a frequency reuse ratio of only 2.28 or 1.2, depending on the formula used. As noted, Celcom also anticipates that it will probably need to modify its cell structure to accomodate portable users, and a different cell structure may also be needed to coordinate frequency use with other cellular systems.

85. For similar reasons, CMS' expansion plan is equally deficient. Since CMS has configured its system on the basis of unreliable five year projections of demand, its expansion plan will require substantial modification if, as appears likely, the volume and distribution of demand do not follow the patterns CMS has predicted. CMS' design approach commits itself, for example, to cell locations where cellular demand may never develop, and conversely may prohibit cell addition or cell splitting in areas where demand may, in fact, arise. AWACS' phased-in approach will enjoy greater flexibility. The record also shows that, although CMS initially proposes a 0.01 grade of service, it has premised its channel demand projections after its third year on a significantly lower service standard of 0.05, and will allow its grade of service to deteriorate to this level for a specified period before taking action. CMS' frequency reuse ratio is also lower than that proposed by AWACS. Finally, as proposed, CMS' system will suffer undue interference as the system expands, limiting or restricting the use of needed assigned frequencies.

86. MCI's expansion plan is seriously flawed as well. Although MCI, unlike its competitors, proposes to maintain its grade of service without waiting for its system to deteriorate for a specified time before increasing capacity, it has presented no specific proposal for expanding its system beyond its initial design. The five step methodology it has submitted provides no details as to how MCI will, in fact, implement expansion of its system, and the applicant has failed to describe the procedures or standards it will establish for determining when system expansion will be required. MCI's purported adherence to its claimed methodology, moreover, is belied by its unexplained decision to ignore the first three stages and to initiate service in a sectorized transmit mode. MCI's system will also generate a lower frequency reuse ratio than AWACS and may, by the applicant's own admission, generate co-channel and adjacent channel interference problems.[173]

*Issue (c)*

87. Issue (c) calls for a comparison of the nature and extent of the service proposed by each applicant, including each applicant's proposed rates, charges, maintenance, personnel, practices, classi-

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[173] Since no cellular systems adjacent to Philadelphia are constructed or authorized, a comparison of the ability of the applicants to coordinate the use of channels with such systems cannot be made.

fications, regulations and facilities (including switching). In its *Report and Order*, the Commission specifically noted that this issue was generally less significant than the first two issues. The Commission also held that, although the adequacy of base station and switching facilities and related maintenance proposals may be an issue in some cases, the agency did not expect this to be a significant issue in general. Finally, the Commission ruled that personnel and practices would be significant "to the extent that they affect an applicant's ability to implement its proposal."[174] On the basis of the record evidence, MCI, AWACS and CMS receive slight preferences under this issue.

88. *Service Offerings and System Features*. Each of the applicants will offer a variety of features to subscribers in addition to basic telephone service, and the record shows that more will be offered by CMS. However, CMS will receive no comparative credit for these offerings since it has failed to demonstrate that any need for them exists.[175] Although MCI has established a need for six service features, it will receive only a slight comparative credit since it will not offer three of these features, and the three which will be offered are also proposed by its competitors.

89. *Rates and Charges*. CMS will receive a preference for its proposed rate structure. CMS will charge a lower monthly access fee than its competitors ($4.95, vs. $40 for Celcom, $50-60 for AWACS, and $15 for MCI) and has further structured its rate proposal to ensure that each subscriber is charged only for actual use of the facilities. Accordingly, CMS will neither impose an air time allowance nor compel the subscriber to take undesired customized services. Celcom and AWACS, on the other hand, will bundle cellular usage and cellular service by compelling subscribers to pay for a minimum of 100 minutes of air-time. This approach recognizes no distinction between variations in subscriber use below and above the allowance amount. As a result, lower frequency use subscribers will effectively subsidize higher frequency use subscribers, thus discouraging usage-sensitive consumers. Moreover, CMS' rate proposal, which contemplates 6 second incremental billing after the initial 30 seconds of each call, is structured so that the subscriber is billed, to the extent possible, only for air-time actually consumed. By contrast, AWACS, MCI and Celcom each propose significantly larger incremental billing periods of one to two minutes, one minute, and one-half minute, respectively, resulting in subscribers being billed

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[174] 86 FCC 2d at 503.

[175] *Houston Mobilfone, Inc.*, 65 FCC 2d 848 at 852.

for large quantities of unused air-time. CMS' three tiered pricing structure will also offer greater efficient use of available spectrum and system facilities than the more limited two-tiered schedules of MCI and Celcom.

90. CMS' preference for its rate proposal, however, will be only slight, since, like the other applicants, CMS has failed to offer evidence establishing the methodology used in formulating its proposed charges. As a result, it is impossible to determine whether or not the proposed rates are realistic. Accordingly, none of the applicants will receive comparative credit for proposed rates, and CMS' preference for its rate structure will be slight.[176]

91. *Personnel, Maintenance, Policies and Facilities.* All four applicants have established an organizational management structure for their proposed systems; all rely to some extent upon the expertise or personnel resources of their corporate parents and, in addition, AWACS, CMS and MCI seek comparative preference on the basis of their communications experience. CMS also seeks comparative credit as a result of Unity's 30% partnership interest in the applicant. No preference, however, will be awarded to any of the applicants on the basis of their personnel proposals. None of the staffing and personnel proposals presented by the parties is flawless or likely to so clearly enhance an applicant's ability to implement its proposal that a preference must result. Celcom's proposal, for example, lacks adequate specificity concerning employee functions. AWACS' proposal is more detailed, but fails to indicate precisely how much time its president will devote to system operations during the first six months of service, and who will oversee the system thereafter. CMS has proposed a staff of 48 employees for its Philadelphia system, but has failed to disclose details concerning the composition of the staff or their functions (beyond the upper level managerial level). Moreover, the officers of CMS are also officers of its parent organization, and the record is silent as to whether any of these individuals will devote any time to the day-to-day administration and maintenance of the Philadelphia system. CMS has failed to establish that these individuals will meaningfully contribute to implementing its proposal. CMS is also entitled to no comparative credit on the basis of Unity's participation since, in light of Unity's failure to establish its financial qualifications, its participation in the partnership is entirely speculative.[177] Moreover, as recently noted in the Designation Order for the *Tampa* cellular proceeding, the

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[176] *Houston Mobilfone, Inc.*, 65 FCC 2d at 859.

[177] *Memorandum Opinon and Order*, FCC 83M-1905, released June 10, 1983.

Commission has never suggested that it would grant a comparative preference for minority participation in cellular proceedings.[178] MCI also has provided insufficient information concerning its Philadelphia staff to warrant a preference. Its proposal for sharing the non-cellular staff of its parent organization is particularly vague, rendering it difficult to evaluate its plan adequately.[179]

92. Although all four applicants have presented maintenance proposals which are theoretically acceptable, the more detailed proposal of AWACS is entitled to a slight comparative preference. Celcom's proposal is comparatively inferior in that it fails to show the composition, management or organization of its technical staff. Although CMS provides a structural framework for its maintenance proposal, nowhere in its direct case does it specify the size of its local technical staff. Finally, as noted, MCI plans to combine non-cellular and cellular staffing without any analysis of how the functions will be integrated. In light of these shortcomings, and the fact that AWACS is the only applicant which has proposed a comprehensive plan for a maintenance staff which will be dedicated solely to its cellular business, AWACS will receive a slight comparative preference.[180]

93. All the applicants have proposed various measures designed to promote better customer service. Nothing in the record indicates, however, that the differences in these proposals have any decisional significance. Moreover, while CMS' plan to fund minority and/or female controlled organizations to engage in retail and service functions is meritorious, current Commission precedent does not support the granting of a preference on the basis of such proposals in the common carrier area. Accordingly, no preference for the proposed practices of the applicants will be awarded.

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[178] *GtE Mobilnet of Tampa, Inc.*, published August 17, 1983, 48 Fed. Reg. 37285 at n. 8.

[179] The Presiding Judge recognizes that all the applicants, with the possible exception of Celcom, have broad experience in mobile communications. No comparative preference will be awarded since, "experience is something that can be acquired, generally conferring only an initial advantage to those who have it." *Houston Mobilfone, Inc.*, 65 FCC 2d at 857.

[180] Although CMS will not deploy redundant signalling channels or redundant base site control units until its fourth year of service, the other applicants will receive no comparative preference since the Commission's *Report and Order* does not indicate that redundancy is a factor of comparative significance in cellular proceedings. Moreover, an applicant seeking a preference for redundancy in its maintenance proposal must perform a cost benefit analysis. *Frank K. Spain*, 77 FCC 2d 20, 25 (1980). In this case, none of the applicants has performed such an analysis.

94. Finally, no comparative preference will be accorded as a result of the facilities proposed by any of the applicants (including switching capabilities). All four applicants have proposed technically acceptable facilities and the record clearly reflects the ability of all four applicants to construct cellular systems technically capable of providing cellular service.

### *Ultimate Conclusions*

95. Under Issue (a), AWACS has received a substantial preference for its superior demand projections, and a moderate preference for its ability to accomodate anticipated demand for local service. These preferences clearly outweigh the slight preferences CMS has received for its proposed geographic area and population and its ability to accomodate anticipated roamer demand, and the slight preference MCI has received for its accomodation of roamer service. Overall, a moderate comparative preference will therefore be accorded to AWACS under Issue (a). AWACS has also been awarded a moderate comparative preference under Issue (b) for its proposal concerning system expansion. Under various aspects of Issue (c), AWACS, MCI and CMS will receive a slight comparative preference over Celcom. In light of the priority the Commission has given to the first two comparative issues, and AWACS' clear superiority under both, it is concluded that AWACS' application is superior to that of its competitors and that the public interest, convenience and necessity will be better served by a grant of AWACS' application and a denial of the applications of Celcom, CMS and MCI.

Accordingly, IT IS ORDERED, That the application of Automatic Wide-Area Cellular Systems, Inc. (File No. 26084-CL-P-(18)-82) IS GRANTED and the applications of Celcom Communications Corporation of Pennsylvania (File No. 26164-CL-P-(16)-82), Cellular Mobile Systems of Pennsylvania (File No. 26188-CL-P-(16)-82) and MCI Cellular Telephone Company (File No. 26113-CL-P-(13)-82) ARE DENIED.[181]

IT IS FURTHER ORDERED, That the Petition For Leave To Supplement Direct Case filed June 21, 1983 by Cellular Mobile Systems of Pennsylvania IS GRANTED and the subject supplement IS ACCEPTED as indicated herein;

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[181] In the event exceptions are not filed within 30 days after release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d) and 22.916(b)(9) of the Commission's Rules.

**IT IS FURTHER ORDERED,** That the "Motion To Strike Portions Of CMS Reply To Proposed Findings Of Fact And Conclusions of Law" filed June 30, 1983 by AWACS, Inc. IS GRANTED as indicated herein;

**IT IS FURTHER ORDERED,** That the Joint Motion for Temporary Deferral Of Initial Decision filed August 23, 1983 by CMS and MCI IS DENIED.

**IT IS FURTHER ORDERED,** That the grant to Automatic Wide-Area Cellular Systems, Inc. IS CONDITIONED upon its obtaining the appropriate antenna structure clearances.

FEDERAL COMMUNICATIONS COMMISSION
JOSEPH CHACHKIN, *Administrative Law Judge*

Application, Amendment of, Right to File
Application, Not Acceptable for Filing
Mobile Radio Service, Cellular
Notice, Sufficiency of
Reconsideration, Petition For, Treated as Appropriate for Review
Rules, Failure to Conform

> Order on Reconsideration adopted regarding the return of Round IV cellular applications for having defective maps referred to Commission in order to reach a final decision on acceptability for filing with a minimum of delay. Reconsideration denied concerning seven applications which were properly returned for failure to submit a map of the required scale and for failure to clearly indicate latitude and longitude in compliance with the properly noticed map requirements of Section 22.903.
> —*Celcom, Inc.*

FCC 86-37

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re

Petitions for Reconsideration of the
Return of Round IV Cellular Applications
for Having Defective Maps

### ORDER ON RECONSIDERATION

Adopted January 17, 1986; Released January 24, 1986

BY THE COMMISSION:

1. Various Round IV cellular applicants seek reconsideration of the actions of the Chief, Mobile Services Division, returning their applications as unacceptable for filing. The petitions for reconsideration have been referred to the Commission under Section 1.106(a)(1) of the rules in order to expedite a final decision on the matters raised. The primary reason for return of the applications listed in the Attachment hereto was defects in the maps required

to be submitted with the applications pursuant to Sections 22.903(a) and 22.913(a)(2) of the Commission's rules. Accordingly, the listed applications have been consolidated for reconsideration.

## *Discussion*

### *A. Celcom, Inc.*

2. Celcom, Inc. (Celcom) seeks reconsideration of the return of its application for the Little Rock, Arkansas MSA.[1] The Division found Celcom's application unacceptable for filing for failure to provide: 1) a map of the proposed Cellular Geographic Service Area (CGSA) drawn to a scale of 1:250,000, as required by Sections 22.903(a) and 22.913(a)(2) of the Commission's rules; and 2) reasonable assurance of site availability, as required by Section 22.15(a)(1). Celcom's Petition addresses both cited defects.[2]

3. With regard to the map issue, Celcom submits that its application included a clean and legible color copy of a U.S. Geological Survey (USGS) map drawn to a scale of 1:250,000 and, thus, complied with the letter of the Commission's rules. Celcom asserts that its engineering consultants first drew the proposed system on four USGS maps, which Celcom appends to its Petition. Celcom states that it elected to satisfy the map requirements of Sections 22.913(a)(2) and 22.903(a) by submitting a map that was photographed from a composite of the four USGS maps. Celcom asserts that the photgraphic copy of the map, which was reduced in size, retains its scale of 1:250,000 and thus complies with the rules. Celcom argues that since the rules do not specify the size of the map, the Division cannot refuse to accept a map drawn to the correct scale just because it is smaller than desired. Celcom also contends that the reason for return of its application is trivial and overly technical; that the pre-screening procedure of the Division constitutes arbitrary administrative action, unfair to applicants who filed in good faith; and that the substantial uncertainty regarding cellular application requirements and the changes in such requirements made by the Bureau in regard to other Round IV applicants reinforces the unfairness in returning Celcom's application.

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[1] Application Number 1 in the Attachment.

[2] Celcom's Petition submits documentation of site availability pre-dating the filing of its application and a statement of the reasons for omission of a site availability certification. Accordingly, we find that Celcom has satisfied the requirements of *Public Notice*, Report No. CL-304, "Modification of Cellular Round IV Pre-Screening Policy," released April 26, 1985. Therefore, we will grant Celcom's Petition to eliminate the site availability issue.

4. We are not persuaded by Celcom's contentions concerning the map submitted with its application. The Commission's rules require cellular applicants to submit a map or maps of the CGSA for the proposed cellular system. Section 22.913(a)(2) of the Rules. This rule section also requires that the map contain all the information specified in Section 22.903(a) of the Commission's rules which states that "the CGSA must be drawn on one or more *U.S. Geological Survey map(s) with a scale of 1:250,000*." (Emphasis added). This explicit requirement was specifically reiterated in *Public Notice*, "Cellular Filing Procedures — An Update," Mimeo 567, 52 RR 2d 725 (1982) (*Procedures Update*). The *Procedures Update* also provided that the "map can not be reduced in size and must be included in the original and *all* copies of the application." *Id.* Finally, in *Advanced Mobile Phone Service, Inc. (Miami)*, 54 RR 2d 260, at 268 fn. 17 (1983), we dealt with a similar situation stating: "The Amcom application includes only an 8″ x 10″ photograph of a properly scaled map: such a reduction is a convenient reference, but fails to provide the clarity and detail that the rules require." The map submitted by Celcom in its application measures approximately 7.5 inches by 9.5 inches, and was reduced in size so that one inch represents approximately 10.9 miles (scale of 1:690,000), while on a map of 1:250,000 scale, one inch represents 3.94 miles. The maps scale is thus significantly larger than that precribed, rendering engineering calculations on the submitted map virtually impossible.[3] Furthermore, we disagree with Celcom's assertions that in spite of the prohibited reduction in size the map retains its legend scale, and thus demonstrates compliance. The scale is defined to be "The proportion that a map ... bears to the thing that it represents." Webster's New World Dictionary, Complete Reference Edition, 1972. The size of what is represented and the scale of the map dictate the dimensions of the map. While the map reproduces a scale and a legend reading "1:250,000", by reducing the map, the scale of the map has been altered. Thus, the scale of the reduced map submitted with Celcom's application is not the same as the full-sized 1:250,000 scale maps from which it was reproduced as a photographic composite.[4]

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[3] Since the map defines the protected service area of cellular licensees, the ability to make engineering calculations and to precisely locate the CGSA boundaries is crucial to the Commission's cellular licensing scheme.

[4] Our requirement pertains to the scale of the map, not its physical size; thus, an applicant submitting a full-scale reproduction of a composite produced from 1:250,000 maps, so that one inch on the maps submitted represented the same distance as it did on the original maps, would be in compliance with the rule.

5. Finally, Celcom was on notice that applications for markets beyond the top 90 would be carefully pre-screened to determine their acceptability for filing under the Commission's cellular rules. *Cellular Lottery Rulemaking*, 98 FCC 2d 175, 220 (1984) (*Lottery Order*). The Commission also stated that by the time applications below the top 90 were filed, applicants should be able to file complete and accurate applications. *Id.* Celcom was clearly on notice that defective applications would be returned and would not be included in the lottery.[5] Accordingly, we conclude that the return of Celcom's application for failure to include a map of the required scale was correct, and we will deny Celcoms Petition.

### *B. Country Wide Cellular, Inc.*

6. Country Wide Cellular, Inc. (CWC) filed Petitions for Reconsideration of the return of its applications in six Round IV cellular markets.[6] The Division found that the maps of CWC's proposed systems in these markets had failed to clearly indicate the latitude and/or longitude and, thus, did not comply with the Commission's map requirements as stated in the *Procedures Update, supra*. We address CWC's contentions on a consolidated basis since they are substantially the same in all six Petitions.

7. CWC first contends that the map defect at issue is minor and that the Division is therefore required to retain these applications on file for the lottery. As support, CWC cites *Moore's Service*, 86 FCC 2d 787, 793 (1981) (*Moore's Service*) and *Revision and Update of Part 22*, 95 FCC 2d 769 (1983) (*Revision*). CWC argues that in the *Revision* the Commission intended that its policy and practice for returning applications under Section 22.20 would follow the *Moore's Service* principle that applications which are blatantly defective will be returned while those with minor defects will be retained on file. Further, CWC contends that in adopting its lottery procedures for Round IV cellular markets the Commission made no modification to the *Moore's Service* principle. Though the Commission restricted the right of applicants to file amendments prior to lottery, it also authorized the tentative selectee in a lottery to cure minor defects with post-lottery amendments. *Lottery Order, supra*, at 220; Section 22.918. CWC argues that Section 22.918 simply defers the filing

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[5] The widespread and reasonable confusion which existed concerning the requirements for certifying site availability, *supra*, note 2, did not exist concerning the requirement for submission of a full size, 1:250,000 scale map. Thus, Celcom's arguments alluding to unfairness in the return of its application are rejected.

[6] Application Numbers 2–7 in the Attachment.

of minor amendments to the post-lottery phase of licensee selection for the sake of administrative efficiency. Finally, CWC argues that Section 22.903 does not specifically require a clear indication of latitude and longitude on the required maps, so that the omission of latitude and longitude indications is not the type of defect that should render applications unacceptable for filing.

8. Second, CWC asserts that in the *Procedures Update, supra*, the Division had adopted the identification of longitude and latitude by degree and minute as a new basic qualifying criterion. CWC contends that such a new requirement had substantial impact on cellular applicants, and that knowledge of it was necessary to keep the public and parties in the cellular process informed of the Commission's requirements. Thus, CWC argues that the requirement constitutes an interpretive rule of general applicability subject to the requirement of the Administrative Procedure Act that it be published in the *Federal Register*. Administrative Procedure Act, 5 U.S.C. Section 552(a)(1) (APA). Since the *Procedures Update* was not published in the *Federal Register*, CWC asserts that it can not be adversely affected by a requirement of which it had neither actual nor constructive knowledge.

9. Finally, CWC contends that since the Common Carrier Bureau set aside letters returning the Round IV cellular applications and modified its pre-screening standards in *Public Notice*, CL–304, *supra* note 2, consistent treatment of its application is required here. CWC submits that the latitude/longitude requirement, like the requirement for a demonstration of 75% coverage of the CGSA, has not received a definitive published interpretation by the Commission. CWC argues that since the difference between the defects addressed earlier and the defect in its applications does not present a principled basis for different treatment, as required by *Green Country Mobilephone, Inc. v. FCC*, 765 F. 2d 235 (D.C. Cir. 1985), refusal to reinstate its application would constitute arbitrary and capricious action.

10. We reject CWC's argument that *Moore's Service, supra*, requires the Commission to retain CWC's application on file for the lottery. In adopting the cellular lottery procedures, we noted that in the top 30 cellular markets the Commission "has been lenient and has accepted applications which have contained a few minor deficiencies, . . . but no blatant deficiencies." *Lottery Order, supra*, at fn. 32. Citing *Moore's Service, supra*, we further stated that: "under the lottery procedures, the staff will continue to screen incoming applications to assure that they are 'acceptable

for filing' and will apply the screening criteria adopted in the top-30 markets." *Id.* We also prohibited all Round IV pre-lottery amendments citing administrative efficiency but also stating: "Cellular applicants should by this time be able to file complete and accurate applications . . . ." *Lottery Order, supra*, at 220. Thus, it is perfectly clear that we intended that only acceptable applications would be included in the lottery, and that no amendments would be permitted to cure any application deficiencies, however minor, prior to the lottery.

11. The omission of latitude and longitude indications from CWC's map is not a minor defect but rather rendered CWC's application blatantly defective and unacceptable for filing. Applications which "either omit very significant information or provide it in practically useless form" have been defined as blatantly defective. *Defective Public Mobile Radio Service applications*, 47 RR 2d 412 (1980). In addition, section 22.20(a)(2) provides that an application is unacceptable for filing if it "does not comply with the Commission's rules, regulations, specific requirements for additional information, or other requirements." The CGSA depicted on the map defines the protected service area of cellular licensees under Section 22.903(b) of the Commission's rules. Thus, the precise location of the CGSA depicted on the map is crucial to the Commission's cellular licensing scheme. Without the latitude and longitude clearly indicated on the map, the precise location of the CGSA boundaries depicted cannot be readily determined. Accordingly, we find that "very significant" information which was required by the Commission's rules was omitted from CWC's map, and that CWC's application was blatantly defective and properly returned as unacceptable for filing. In sum, we find that CWC simply failed to heed our warning that: "The staff will carefully pre-screen the cellular applications to ensure that deficient applications are not included in the lottery." *Lottery Order, supra*, at 185.

12. We also reject CWC's argument that the latitude/longitude requirement set forth in the *Procedures Update, supra*, was adopted in violation of Section 552(a)(1) of the APA. Section 22.903 explicitly requires that an applicant's CGSA must be drawn on one or more *U.S. Geological Survey map(s)*.[7] (emphasis

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[7] The map requirement was established in the *Cellular Rulemaking Decision*, 86 FCC 2d 469 (1981), which added to Section 22 of the rules a new subpart K in which 22.903 originally stated, "The CGSA must be drawn on one or more U.S. Geological survey 7 1/2 minute map(s)." This language was changed to "The CGSA must be drawn on one or more U.S. Geological Survey maps with a scale of 1:250,000." *Cellular Reconsideration Decision*, 89 FCC 2d 56 (1982). This

added). Section 22.2 of the Commission's rules defines "Maps" a "A representation on a flat surface, of a part or whole of the Earth's surface" and specifically requires that "All maps submitted under this part shall include latitude, longitude and scale." Thus, the Commission's rules specifically require all submitted maps to include latitude and longitude information. Furthermore, USGS maps contain geographical and cartographical information, including indications of latitude and longitude. USGS maps with the scale required by Section 22.903 uniformly provide the latitude information of degrees and minutes in 15 minute intervals along the inside of both of their vertical borders, and the longitude, in the same way, along both the top and bottom borders.[8] Thus, a clear indication of latitude and longitude is an inherent part of the map which Section 22.903(a) requires all cellular applicants to submit.[9] The *Procedures Update* merely reiterated the latitude/longitude requirement specifically set-forth in Section 22.2 and inherent in Section 22.903. Since the *Procedures Update*, established no new filing requirements, the Federal Register publication requirements of Section 552(a)(1) of the APA are not applicable. Finally, in *Celcom Communications Corp. of Georgia*, 52 RR 2d 1674, at 1682 (1983) (*Atlanta Designation Order*), we dealt with an applicant's compliance with our map requirements stating: "the map must indicate pertinent border information to determine proper station plotting of all cell sites." This map requirement was published in the Federal Register. 48 Fed. Reg. 4720, 4723, February 2, 1983. *Accord, Advanced Mobile Phone Service, Inc. (Philadelphia)*, 52 RR 2d 1593, at 1599 (1983), 48 Fed. Reg. 3862, 3864, January 27, 1983. Accordingly, we find that CWC's notice arguments lack merit.[10]

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language, which was published in the Federal Register, remained unchanged with Lottery Order, *supra*, at Appendix B.

[8] The maps have the latitude and longitude lines marked off in 7 1/2 minute intervals, but the numerical information is given for every 15 minutes of distance. Since the 1:250,000 scale maps are so marked, there was essentially no change in the map required from the Report and Order, *supra* to the Reconsideration Order, *supra*, even though the language was different.

[9] The Commission also recognized that "one or more" USGS maps might be necessary since some parts of an MSA could overlap different USGS map sections. Where multiple maps, or a composite thereof, are submitted, applicants have complied with the latitude/longitude requirement either by including the outer borders of the composite map or by adding and labeling specific intersections of latitude and longitude on the portions of the USGS maps submitted.

[10] We note that the *Procedures Update* is published in Pike and Fisher Radio Regulation, 52 RR 2d 725, and Commission documents so published may be relied upon by the Commission and private parties; a rule so providing is contained in the Code of Federal Regulations, 47 C.F.R. 0.445(e).

13. In contending that its application should receive treatment consistent with that accorded other Round IV applications under modified pre-screening standards, CWC overlooks the justification for the Bureau's actions. Public Notice CL–304, *supra* note 2, was issued because of a widespread confusion among applicants regarding the evidence necessary to satisfy the coverage "demonstration" requirement of Section 22.903(a) of the Commission's Rules and regarding the Section 22.15(a)(1) requirement to provide reasonable assurance of site availability. The widespread confusion respecting these requirements was understandable and justified in light of the Commission's failure to publish any definitive interpretation of the coverage "demonstration" requirement and in light of the arguably conflicting guidance in Public Notice, CL–75, released June 8, 1984, respecting site availability demonstrations. These circumstances do not exist concerning the requirement for a clear indication of latitude and longitude. As mentioned previously, Section 22.2 requires that all maps contain latitude and longitude, and the USGS map(s) required by Section 22.903 uniformly include this information.[11] Consequently, there was no need for a "definitive interpretation". Furthermore, there was no widespread confusion regarding the latitude/longitude requirement.[12] Thus, CWC is simply not in a position comparable to the applicants affected by Public Notice CL–304, and the decision in *Green Country, supra*, is inapplicable. Accordingly, we conclude that CWC's six applications were properly returned and we will deny its Petitions for Reconsideration.

## *Ordering Paragraphs*

14. IT IS ORDERED, that the Petitions for Reconsideration respecting the applications listed in the attachment ARE DENIED.

15. A copy of this order will be mailed to the Attorney of Record or to the Contact Representative designated in each of the involved Petitions for Reconsideration.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

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[11] An applicant not using full USGS maps does so at its peril.

[12] Only a handful of Round IV applicants submitted defective maps.

## *Attachment*

### APPLICATIONS ASSOCIATED WITH THIS ORDER

| | |
|---|---|
| 1. Celcom, Inc. | File No. 33522-CL-P-092-A-84 |
| 2. Country Wide Cellular, Inc. | File No. 30794-CL-P-094-A-84 |
| 3. Country Wide Cellular, Inc. | File No. 30763-CL-P-098-A-84 |
| 4. Country Wide Cellular, Inc. | File No. 30701-CL-P-101-A-84 |
| 5. Country Wide Cellular, Inc. | File No. 30677-CL-P-104-A-84 |
| 6. Country Wide Cellular, Inc. | File No. 30581-CL-P-111-A-84 |
| 7. Country Wide Cellular, Inc. | File No. 30743-CL-P-116-A-84 |

END

**Comparative, Coverage Issue**
**Construction, Premature**
**Premature Construction, See Construction Premature**

**FCC overturns previous ruling allowing the licensing of a broadcast station which had been completely built prior to obtaining a construction permit. Applicant's construction activities here did not violate Section 319(a) of the Communications Act. Winner receives moderate-to-substantial signal coverage preference.**

**— *Christian B/cing of Midlands, Inc.***

**BC Docket No. 81-178**

**FCC 86-77**

## BEFORE THE
# FEDERAL COMMUNICATIONS COMMISSION
### WASHINGTON, D.C. 20554

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| In re Applications of | |
| CHRISTIAN BROADCASTING OF THE MIDLANDS, INC. Omaha, Nebraska | BC DOCKET NO. 81-178<br>File No. BPCT-790327LD |
| HARRY J. PAPPAS Omaha, Nebraska | BC DOCKET NO. 81-179<br>File No. BPCT-791026LB |
| For a Construction Permit for a New UHF Commercial Television Broadcast Station | |

## ORDER

Adopted: February 11, 1986; Released: February 14, 1986

BY THE COMMISSION: COMMISSIONER QUELLO CONCURRING AND ISSUING A STATEMENT; COMMISSIONER PATRICK IN THE RESULT.

1. The Commission has before it: (a) an Application for Review

of the Review Board Decision herein[1] filed November 30, 1984 by Christian Broadcasting of the Midlands, Inc. (Christian);[2] (b) an Opposition to (a) filed December 17, 1984, by Harry J. Pappas; (c) a Motion for Expedited Consideration of (a) filed May 6, 1985, by Mr. Pappas; (d) a Motion to Reopen Record for Enlargement of Issues filed August 26, 1985, by Christian; (e) an Opposition to (d) filed September 6, 1985, by Mr. Pappas; (f) a Reply to (e) filed September 18, 1985, by Christian; (g) a Petition to Reopen Record filed November 8, 1985, by Christian;[3] and (h) an Opposition to (g) filed November 20, 1985, by Mr. Pappas.

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[1] *Christian Broadcasting of the Midlands, Inc.*, 99 F.C.C. 2d 578 (1984). The Review Board's Decision awarded Christian a slight diversification preference based upon the facts that Christian had no mass media interest, whereas Mr. Pappas was the licensee of two UHF television stations: Station KMPH at Visalia, California, and Station WHNS at Asheville, North Carolina. On September 25, 1985, the Commission granted an application (FCC File No. BTCCT-840529KF) for transfer of control of Metro Communications South, Inc. (Metro) to Mr. Pappas. *See Pete J. Stathakus, et al*, FCC 85-526, released October 23, 1985. Metro holds a construction permit for new commercial television Station WGCG-TV, Channel 48, Greenwood, South Carolina. In granting the foregoing transfer of control application, the Commission authorized him to operate Station WGCG-TV as "primarily a satellite" of Station WHNS. Station WGCG-TV will be primarily a satellite station and will operate approximately 1500 miles from the proposed stations involved in this proceeding. Under these circumstances, Mr. Pappas' recent broadcast acquisition, even when combined with Mr. Pappas' other interests, provides no basis for an award of more than a slight diversification preference to Christian.

[2] In its Application for Review, Christian Broadcasting of the Midlands Inc. (Christian) argues, *inter alia*, that it should receive a moderate preference under the diversification of control of mass media criterion of our *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C. 2d 393, 395 (1965), rather than the slight preference awarded by the Review Board. In this regard, Christian cites one case which warrants discussion: *Resort Broadcasting Co., Inc.*, 41 F.C.C. 2d 640 (Rev. Bd. 1973), *review denied*, FCC 74-139, released February 6, 1974, *affirmed sub nom. Resort Broadcasting Co., Inc.* v. *FCC*, 511 F.2d 448 (D.C. Cir. 1975). *Resort* was a comparative case in which one of two applicants for a Florida FM station received a "significant" (not "substantial" as Christian claims) diversification preference because it held no media interests, whereas its opponent's 50 percent shareholder was the principal stockholder of an AM/FM combination in New Jersey, as well as a six percent owner of a cable television firm which held several franchises in New Jersey. Although the Review Board in that case used the term "significant" to describe the diversification preference, the winner in *Resort* actually received a slight diversification preference which outweighed two very slight preferences for integration and efficient frequency use. In brief, *Resort* was a very close case where a slight diversification preference was "significant" because it was determinative, but it provides no basis for more than a slight diversification preference for Christian in this case.

[3] Christian requests that we consider the impact of Mr. Pappas' acquisition of the permittee of Station WGCG-TV, Greenwood, South Carolina, on our diversification analysis in this proceeding. To the extent that we have considered that impact in footnote 1, *supra*, we have granted Christian's petition.

2. In its Motion to Reopen Record for Enlargement of Issues filed August 26, 1985, Christian requests that the record herein be reopened to determine whether Mr. Pappas' application should be denied or, alternatively, whether Pappas should receive a substantial comparative demerit for engaging in what Christian views as prohibited premature construction of his proposed facilities. Mr. Pappas has admitted Christian's claims that he has begun construction of the broadcast antenna tower for his proposed station, including a tower base and anchors, and that a new power line to supply the transmitter/tower site is being installed. Mr. Pappas interprets Section 319(a) of the Communications Act of 1934, as amended (47 U.S.C. § 319(a)), as permitting such construction so long as the station is not put on the air prior to the issuance of a construction permit, citing *King Country Broadcasters*, 55 R.R. 2d 1591, 1592 (1984).

3. We shall deny Christian's Motion to Reopen the Record. The Commission grants Motions to Reopen the Record only when the proffered evidence would affect the ultimate decision in this case. *See, e.g., Southeast Arkansas Radio, Inc.*, 61 F.C.C. 2d 72, 74 (1976). In this case, the proffered evidence would not be of decisional significance. Mr. Pappas' construction activities did not constitute premature construction in violation of Section 319(a) of the Communications Act. We believe that our opinion in *Patton Communications Corp.* (*Patton*), 81 F.C.C. 2d 336 (1980), is applicable here. There, we issued a declaratory ruling that the pouring of concrete footings for a broadcast tower did not constitute premature construction in violation of Section 319(a) of the Communications Act. We observed that some outdoor construction is impossible during winter months in certain parts of the country and that it would be anomalous to interpret Section 319(a) in a manner that would hinder a permittee from complying with Section 319(a), which requires the prompt completion of construction. Here, it appears that the limited construction activity in which Mr. Pappas has engaged, *i.e.*, installation of a tower base and anchors and of a new power line, would likewise be impossible to accomplish in winter months and that it involves only a relatively minor expenditure of funds. Thus, for essentially the same reasons set forth in *Patton*, we find no violations of Section 319(a) of the Communications Act.

4. However, we take this opportunity to clarify a matter in this regard, *i.e.*, our opinion in *King Country*, *supra*. There, we observed that the language of Section 319(a) does not directly mandate a proscription on licensing facilities constructed prior to

the issuance of a construction permit and that it merely states that the Commission must grant a construction permit for a station at some time prior to issuing a license for that station. After further study of the legislative history of that Section, we are persuaded that Congress did not intend for this agency to license an entire station which had been built prior to receiving a construction permit.[4] Accordingly, we overrule *King* insofar as it is inconsistent with *Patton*, *supra*, and this case.

5. ACCORDINGLY, IT IS ORDERED, That the Application for Review of the Review Board's Decision herein filed November 30, 1984, and the Motion to Reopen Record for Enlargement of Issues filed August 26, 1985, by Christian Broadcasting of the Midlands, Inc. ARE DENIED; the Motion for Expedited Consideration of Application for Review filed May 6, 1985, by Harry J. Pappas IS DISMISSED as moot; and the Petition to Reopen Record filed November 8, 1985, by Christian Broadcasting of the Midlands, Inc. IS GRANTED to the extent indicated herein and IS DENIED in all other respects.

6. IT IS FURTHER ORDERED, That the application of Harry J. Pappas (File No. BPCT-791026LB) IS GRANTED and the application of Christian Broadcasting of the Midlands, Inc. (File No. BPCT-790327LD) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

### Concurring Statement of FCC Commissioner James H. Quello

In re: Applications of Christian Broadcasting of the Midlands, Inc. and Harry J. Pappas for a Construction Permit for a New UHF Commercial Television Broadcast Station; BC Docket Nos. 81-178, 81-179.

I support affirming the Review Board's decision. In addition, I agree that to the extent the Commission's decision in *King Country Broadcasters*, 55 Rad.Reg.2d(P&F) 1591 (1984), could encourage construction of broadcast facilities without a construction permit, that decision should be overruled.

I wish to emphasize, however, that I do not believe that Section 319 of the Communication's Act, 47 U.S.C. § 319, precludes the

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[4] *See* Hearings on H.R. 5589 before the Committee on Merchant Marine and Fisheries, House of Rep. 69th Cong. 1st Sess., pp. 12, 33-34 (1926).

Commission from behaving reasonably in light of all circumstances in dealing with the premature construction of broadcast facilities. Thus, I do not regard the Commission's decision in *Patton Communications Corp.*, 81 F.C.C. 2d 336 (1980), or the instant decision as setting any outer limit on Commission authority to license facilities when construction began prior to the obtaining of a construction permit.

Common Carrier, Operating Expenses
Depreciation Rate

> Commission prescribed updated depreciation rates and amortizations for two domestic telephone companies. The rates so prescribed are for the classes of plant shown in the Appendix to the Order and are based upon the Straight Line Equal Life Group (SLELG), and Straight Line Remaining Life (SLRL) methodologies.
> —*Continental of Virginia*

FCC 85-657

BEFORE THE

# FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

The Prescription of Revised Percentages
of Depreciation pursuant to the
Communications Act of 1934, as amended
for:

Continental Telephone Company of
Virginia General Telephone Company of
Florida

## ORDER

Adopted: December 18, 1985; Released: December 31, 1985

BY THE COMMISSION:

## I. INTRODUCTION

1. The Communications Act of 1934, as amended, grants this Commission the authority to prescribe depreciation rates for common carriers and to revise these rates when it deems necessary. By this order we prescribe revised depreciation rates for Continental Telephone Company of Virginia, (Continental of Virginia) and General Telephone Company of Florida (General of Florida) using straight-line vintage group remaining-life, straight-

line equal life group remaining-life, straight-line equal life group remaining-life, and amortization procedures.

## *II. Background*

### *A. Methods*

2. We approved the use of the above straight-line vintage group remaining-life and straight-line equal life group remaining-life procedures in our final decision in *Property Depreciation*, Docket No. 20188, 83 FCC 2d 267 (1980), *reconsideration*, 87 FCC 2d 916 (1981). The remaining-life procedure is designed to distribute the unrecovered cost of an account (including any reserve deficit or surplus) over its estimated average remaining life. The equal life group procedure was adopted to allow for depreciation at rates more representative of consumption of capital than that allowed by the use of the vintage group whole life procedure which had been used exclusively prior to our decision in Docket No. 20188. In accordance with our decision in that Docket we implemented rates using these new procedures in the depreciation prescription orders which we adopted beginning in 1981. In *Depreciation Rates*, 92 FCC 2d 920 (1982) we provided for amortization of dying accounts. This order represents a continuation of these procedures.

### *B. Review Procedures*

3. For many years it has been our practice to review and revise depreciation rates for one-third of the major domestic telephone companies every year. Thus, every three years depreciation rates for all the major telephone companies are reviewed and revised as we find necessary. In recent depreciation orders we discussed the increased volatility of depreciation rates using the new procedures and concluded it may be necessary to update the rates annually to keep them in line with accounting activity (i.e., plant additions, retirements, and net salvage). In 1983 we established streamlined study procedures whereby carriers could file for the annual update of rates in between complete reviews, using the same equipment life and salvage estimates that underlie prescribed rates. Continental of Virginia and General of Florida filed for annual updates using these streamlined procedures.

4. Inasmuch as the rates under consideration here are based primarily upon equipment life and salvage estimates underlying prescribed rates rather than revised estimates based upon new studies, much of the time and effort normally expended in a

review was not required here. Furthermore, since these estimates had been discussed at length in prior three-way meetings[1] it was not necessary to conduct such meetings during 1985. Instead, the few questions that were raised during this update review process were discussed in correspondence, telephone conversations, and informal meetings with Company representatives. As a result of the review and discussion, the carriers submitted revised filings.

5. After discussing the matters with the carriers and respective state commissions and reevaluating its preliminary recommendations, our staff issued a Public Notice dated October 7, 1985, entitled, "Depreciation Rate Prescriptions Proposed for Domestic Telephone Companies — Notice of Opportunity for Comment." The staff transmitted to each company and state commission involved a copy of the October 7 Public Notice.

## *III. DISCUSSION*

### *A. Rates*

6. Our staff reviewed the carriers' revised filings and determined that, with one exception,[2] the proposed rates and amortizations were determined in accordance with both our annual update procedures and our depreciation methods. The only party that submitted a response to the public notice concurred with the revised filings.[3] Inasmuch as our staff has found the rates to be consistent with our procedures and rules and no comments have been submitted in opposition to these revised depreciation filings, we adopt their use.

### *B. Effective Dates*

7. Continental of Virginia requested an effective date of January 1, 1985, and General of Florida requested an effective date of October 1, 1985. Inasmuch as no comments were filed in opposition to the requested effective dates, and the requested

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[1] It has been our practice to hold three-way meetings between representatives of the telephone carriers and the staffs of the respective state commission(s) and our Commission to discuss and resolve many of the issues raised in the carriers' depreciation rate filings.

[2] General of Florida proposed a rate for its COE-Electronic Analog account based upon a new life estimate. After a thorough review of this proposal, our staff and the staff of the Florida Public Service Commission agreed that a modification in the prescribed projection life and net salvage estimates was in order.

[3] A copy of Virginia State Corporation Commission's letter dated October 23, 1985 is available for inspection in Suite 257, 2000 L Street, N.W., Washington, D.C.

dates are within the provisions of Section 43.43(e) of our Rules, we grant the effective dates requested.

## *IV. ORDERING CLAUSE*

8. ACCORDINGLY, IT IS ORDERED, pursuant to Sections 1, 4(i), 201–205 and 220(b) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 151, 154(i), 201–205 and 220(b), that the percentages of depreciation and amortization amounts set forth in the Appendix to this order are prescribed effective on the date listed.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

# APPENDIX

## FEDERAL COMMUNICATIONS COMMISSION

### Schedule of Annual Percentages of Decpreciation for Continental Telephone Company of Virginia

Effective January 1, 1985

| *Account Number* | *Class or Subclass of Plant* | *Average Remaining Life* | *Future Net Salvage %* | *Reserve Ratio %* | *Remaining Life Rate %* | *First ELG Year* |
|---|---|---|---|---|---|---|
| 212 | BUILDINGS | 33.0 | 1 | 18.3 | 2.4 | |
| 212 | LEASEHOLD IMPROVEMENTS | 7.5 | 0 | 36.4 | 8.5 | |
| 221 | COE – STEP-BY-STEP & MOBILE | 2.0 | 2 | 42.4 | 27.8 | |
| 221 | COE – CORD SWITCHBOARD | 3.5 | 0 | 81.7 | 5.2 | |
| 221 | COE – TSD SWITCHBOARD | 3.4 | 0 | 88.8 | 3.3 | |
| 221 | COE – ANALOG ELECTRONIC | 4.6 | 0 | 45.6 | 11.8 | |
| 221 | COE – CROSSBAR | – | – | 100.0 | 0.0 | |
| 221 | COE – ANALOG MICROWAVE[1] | | | | | |
| 221 | COE – DIGITAL MICROWAVE | 11.9 | 0 | 19.8 | 6.7 | 1982 |
| 221 | COE – POWER | 6.0 | 1 | 26.9 | 12.0 | |
| 221 | COE – CIRCUIT | 7.1 | 10 | 21.0 | 9.7 | 1982 |
| 221 | COE – ANI | 2.4 | 2 | 73.3 | 10.3 | |
| 221 | COE – DIGITAL ELECTRONIC | 11.8 | 0 | 9.8 | 7.6 | 1982 |
| 231 | STATION APP – SPECIAL SVC, ETC | 7.1 | 10 | 21.0 | 9.7 | |
| 234 | LARGE PBX | 2.2 | 0 | 68.0 | 14.5 | |
| 235 | PUBLIC TELEPHONES | 6.8 | 0 | 34.4 | 9.6 | |
| 241 | POLE LINES | 14.5 | -55 | 50.3 | 7.2 | 1982 |
| 242.1 | AERIAL CABLE | 17.0 | 2 | 29.2 | 4.0 | 1982 |
| 242.2 | UNDERGROUND CABLE | 25.0 | 0 | 23.8 | 3.0 | 1982 |
| 242.3 | BURIED CABLE | 20.0 | 4 | 17.1 | 3.0 | 1982 |
| 242.4 | SUBMARINE CABLE | 17.1 | 0 | 66.0 | 2.0 | 1982 |
| 243 | AERIAL WIRE[2] | | | | | |
| 244 | UNDERGROUND CONDUIT | 38.0 | 0 | 24.0 | 2.0 | 1982 |
| 261 | FURNITURE & OFFICE EQUIPMENT | 19.0 | 8 | 34.2 | 3.0 | |
| 262 | COMPANY OFFICIAL EQUIPMENT | 8.1 | 0 | 16.5 | 10.3 | |
| 264 | MOTOR VEHICLES | 2.4 | 20 | 75.2 | 2.0 | |
| 264 | OTHER WORK EQUIPMENT | 13.8 | 0 | 39.9 | 4.4 | |

[1] The January 1, 1985 net book cost of $2,865,210 is to be amortized in equal annual amounts of $1,432,605 over two years.

[2] The January 1, 1985 net book cost of $927,413 less the future net salvage estimate of -$554,897 is to be amortized in equal annual amounts of $494,103 over three years.

### FEDERAL COMMUNICATIONS COMMISSION
### Schedule of Annual Percentages of Decpreciation for General Telephone Company of Florida

Effective October 1, 1985

| *Account Number* | *Class or Subclass of Plant* | *Average Remaining Life* | *Future Net Salvage %* | *Reserve Ratio %* | *Remaining Life Rate %* | *First ELG Year* |
|---|---|---|---|---|---|---|
| 212 | BUILDINGS | 30.0 | 0.0 | 22.6 | 2.6 | 1984 |
| 221 | COE — MANUAL SWITCHTING EQUIP | 12.7 | 1.0 | 9.1 | 7.4 | |
| 221 | COE — ELECTROMECHANICAL SW | 1.7 | −1.2 | 60.1 | 24.2 | |
| 221 | COE — ELECTRONIC ANALOG | 8.2 | 3.0 | 34.5 | 7.6 | 1983 |
| 221 | COE — ELECTRONIC DIGITAL | 13.2 | 5.0 | 6.8 | 6.7 | 1983 |
| 221 | COE — ELECTROMECHANICAL AMRE | 1.8 | −1.4 | 77.4 | 13.3 | |
| 221 | COE — CIRCUIT | 9.1 | 17.0 | 17.5 | 7.2 | 1983 |
| 221 | COE — RADIO | 6.1 | 3.0 | 41.3 | 9.1 | 1983 |
| 231 | STATION APP — TELEPHONE | 5.2 | 2.5 | 26.3 | 13.7 | |
| 231 | STATION APP — TELETYPEWRITER | 8.0 | 7.5 | 19.2 | 9.2 | |
| 231 | STATION APP — RADIOTELEPHONE | 4.8 | 0.0 | 24.0 | 15.8 | |
| 234 | LARGE PBX | 4.7 | 1.7 | 28.5 | 14.9 | |
| 235 | PUBLIC TELEPHONE EQUIPMENT | 3.6 | 4.0 | 33.1 | 17.5 | |
| 241 | POLE LINES | 15.1 | −60.0 | 35.5 | 8.2 | 1982 |
| 242.1 | AERIAL CABLE | 17.0 | −6.0 | 31.3 | 4.4 | 1982 |
| 242.2 | UNDERGROUND CABLE | 27.0 | 12.0 | 16.8 | 2.6 | 1982 |
| 242.3 | BURIED CABLE | 22.0 | −5.0 | 22.0 | 3.8 | 1982 |
| 242.4 | SUBMARINE CABLE | 16.8 | −12.0 | 42.3 | 4.1 | 1982 |
| 243 | AERIAL WIRE | 7.7 | −30.0 | 48.8 | 10.5 | |
| 244 | UNDERGROUND CONDUIT | 46.0 | −7.0 | 16.4 | 2.0 | 1982 |
| 261 | FURNITURE | 11.1 | 1.0 | 19.6 | 7.2 | 1984 |
| 261 | COMPUTERS/DATA EQUIPMENT | 4.9 | 1.0 | −7.8 | 21.8 | 1984 |
| 261 | OFFICE EQUIPMENT | 7.9 | 1.0 | 11.2 | 11.1 | 1984 |
| 261 | COMPANY OFFICIAL EQUIPMENT | 4.3 | 3.1 | 22.8 | 17.2 | |
| 264 | MOTOR VEHICLES | 6.8 | 20.0 | 54.1 | 3.8 | 1984 |
| 264 | MOTOR VEHICLE SHOP EQUIP | 12.6 | 6.0 | 28.5 | 5.2 | 1984 |
| 264 | TOOLS & OTHER WORK EQUIP | 6.2 | 2.0 | 34.0 | 10.3 | 1984 |

Comparative Issue

Substantial demerit assigned under diversification where applicant owned AM station in proposed community of license. Presence of other media in community does not make preference insubstantial. Integration challenge also rejected as unsupported by record.

*—Hugh M. McBeath*

MM Docket No. 83-1193

FCC 86R-3

BEFORE THE

# FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

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| In re Applications of | |
| HUGH M. MCBEATH Midland, Texas | MM Docket<br>No. 83-1193<br>File No.<br>BPH-820507BD |
| RESPONSIVE CHORD COMMUNICATIONS, LTD. Midland, Texas | MM Docket<br>No. 83-1197<br>File No.<br>BPH-820624AF |
| For Construction Permit for a New FM Station | |

*Appearances*

*Eugene L. Burke* on behalf of Hugh M. McBeath; and *Rudolph L. Ennis* on behalf of Responsive Chord Communications, Ltd.

## DECISION

Adopted: January 23, 1986; Released: January 28, 1986

BY THE REVIEW BOARD: MARINO (CHAIRMAN), JACOBS, AND BLUMENTHAL.

BOARD CHAIRMAN MARINO:

1. In an Initial Decision (I.D.), FCC 85D-19, released July 30, 1985, in this proceeding to select a permittee for a new FM station to operate on Channel 294C at Midland, Texas, Administrative Law Judge Tierney concluded that Responsive Chord Communications, Ltd. (Responsive Chord) was the preferred applicant because of its substantial preference under the factor of diversification of media control. This conclusion was based on the fact that the competing applicant, Hugh M. McBeath, already owned AM Station KJBC in Midland. McBeath's exceptions raise no new matters nor point out material errors in the I.D.; therefore, except as modified below, the ALJ's findings and conclusions are adopted and the grant to Responsive Chord is summarily affirmed.[1]

2. *Diversification of Control.* Responsive Chord has no other cognizable media interests whereas McBeath is the licensee of a daytime-only AM station in the proposed community of license. I.D., para. 38. In excepting to the ALJ's award of a substantial preference to its opponent under this factor (I.D., para. 53), McBeath contends that the ALJ did not credit his proposal to dispose of his AM station within three years of commencing program tests on the new FM station; that the I.D. did not take account of his plan to turn over management of the AM station to his wife pending its divestiture; and that the ALJ ignored the presence of other media services available to Midland. (McBeath Exc. Nos. 3, 4, 7, 10). In making these arguments, McBeath appears to rely on the *Second Report and Order in MM Docket No. 84-231*, FCC 85-124, released April 12, 1985, in which the Commission decided to give special consideration to certain AM daytimers seeking companion FM stations. On the basis of well-settled law, we reject each of these contentions. First, McBeath's divestiture pledge comes too late. It was not made at the B cut-off date, as required, but at the hearing and therefore

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[1] Nearly ten years after the Commission changed its adjudicatory rules to promote issue-oriented appellate proceedings by requiring the filing of a consolidated brief and exceptions in which the exceptions would be stated as part of the argument, *see Adjudicatory Re-regulation Proposals*, 58 FCC 2d 865, 875, 36 RR 2d 1203, 1216 (1976) and 47 C.F.R. 1.276(a)(2), McBeath has submitted separately a list of 13 enumerated exceptions (albeit Exception No. 5 is merely a blank space). While we have nevertheless endeavored, for reasons unrelated to nostalgia, to consider McBeath's exceptions, our indulgence stops short of granting his requeset for oral argument. Such argument would not materially aid us in resolution of this uncomplicated proceeding. *See* 47 C.F.R. 1.277(c); *Van Buren Community Service*, 87 FCC 2d 1018, 1019, 50 RR 2d 115, 117 (Rev. Bd. 1981).

was properly rejected by the ALJ. *See* tr. 109-112; *Vacationland Broadcasting Co., Inc.*, 97 FCC 2d 485, 488, 55 RR 2d 1299, 1302 (Rev. Bd.), *recon. denied*, 56 RR 2d 1260 (Rev. Bd. 1984), *rev. denied*, FCC 85-275 (Comm'n 1985). Moreover, divestiture pledges, when timely made, are expected to be effectuated prior to commencement of operation of the station being applied for. Id. at 498. 55 RR 2d at 1308.

Insofar as McBeath looks for support to the *Second Report and Order, supra*, which implements BC Docket No. 80-90 to increase the availability of FM broadcast assignments, we note that the new policies stated therein apply not only to the new FM allotments but to all future comparative proceedings involving FM applications designated for hearing after May 20, 1985. *Id.* at n. 1, para. 20, n. 13, and para. 36. However, because the applications for Midland's Channel 294C were set for hearing by *Hearing Designation Order*, MM Mimeo No. 661, released November 14, 1983, those new policies are not opposite here. *Cf. Perry S. Smith*, FCC 85R-40, released May 9, 1985, n. 3.

3. Second, McBeath's plan to turn over management of Station KJBC to his wife would not alter the fact that he is the licensee of that station. Although McBeath claimed at the hearing that his wife is half owner of KJBC (Tr. 109), application of the Commission's spousal attribution policies would still require fully crediting the AM station to McBeath for diversification purposes. *See Alexander S. Klein, Jr.*, 86 FCC 2d 423, 425-7, 49 RR 2d 606, 608-11 (1981); *Cannon Communications Corp.*, 58 RR 2d 950, 958, (Rev. Bd. 1985). Finally, we reject McBeath's claim that the presence of other media outlets in Midland should render Responsive Chord's preference "insignificant." (Br. at 9). Because Responsive Chord will provide a new media voice to Midland whereas McBeath will not, Responsive Chord's preference is substantial. *See Communications Properties, Inc.*, 92 FCC 2d 46, 47, 52 RR 2d 981, 983 (Rev. Bd. 1982), *rev. denied*, FCC 83-320, released July 7, 1983; *Nuance Corp.*, 85 FCC 2d 412, 420-21, 49 RR 2d 147, 154 (Rev. Bd.), *rev. denied*, FCC 81-473, released October 7, 1981; *cf. Music Sound Radio, Inc.*, FCC 85R-104, released January 7, 1986, para. 4 (where loser owns *only* station in proposed community, winner's preference may be "well-nigh overwhelming.")

4. *Other Matters.* McBeath also seeks to diminish the 100% full-time integration credit awarded Responsive Chord by the ALJ by claiming that its opponent's three integrated principals are not fully committed to work at the station and in particular that its

proposed general manager has outside business interests that will interfere with his station role. (McBeath Exc. Nos. 2, 8, 9). These exceptions are denied as being completely without foundation in the record. In fact, each of Responsive Chord's integrated owners has expressly undertaken to work at a specified managerial position at least 40 hours a week for an indefinite period of time. (I.D., paras. 21, 25, 30; Responsive Chord Exhs. 2, 3, 4). And Responsive Chord's general manager, George A. Veloz, has explained on the record that he has either disposed of or has accommodated his outside interests in order to effectuate his primary obligation to the station. Tr. 131, 137-8. That is all that is required. *See Central Texas Broadcasting Co., Ltd.*, 90 FCC 2d 583, 596, 51 RR 2d 1478, 1487 (Rev. Bd.), *recon. denied*, FCC 82R-77, released December 22, 1982, *rev. denied*, FCC 83-415, released September 21, 1983. If any deficiency exists pertaining to the integration proposals in this case, it is with McBeath who does not deny Responsive Chord's contention that McBeath nowhere stated on the hearing record that he would work a minimum of 40 hours a week in support of his claim of full-time integration credit. (Responsive Chord Br. at 3-5; McBeath Reply at 1-3). The requirement for such testimonial precision was set forth by the Board a year prior to the hearing in this case. *See Vacationland, supra*, 97 FCC 2d at 492, 55 RR 2d at 1304. While the ALJ allowed the noted "imperfection" and accorded McBeath the credit he sought (I.D., para. 46), we need not, and do not, rule on this point, or on McBeath's other exceptions regarding the integration enhancement factors, and Responsive Chord's coverage advantage. These matters are non-decisional here because Responsive Chord's substantial diversification preference is the dominant comparative feature of this case and mandates a grant of its application.

5. ACCORDINGLY, IT IS ORDERED, That the application of Responsive Chord Communications, Ltd. (File No. BPH-820624AF) for authority to construct a new FM station on Channel 294C at Midland, Texas IS GRANTED, and the application of Hugh M. McBeath (File No. BPH-820507BD) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

JOSEPH A. MARINO, *Chairman, Review Board*

FCC 85D-49

BEFORE THE

# FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

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| In re Applications of | |
| HUGH M. MCBEATH Midland, Texas | MM Docket No. 83-1193<br>File No. BPH-820507BD |
| RESPONSIVE CHORD COMMUNICATIONS, LTD. Midland, Texas | MM Docket No. 83-1197<br>File No. BPH-820624AF |
| For Construction Permit for a New FM Station | |

*Appearances*

Eugene L. Burke, Esq. (Burke & Burke) on behalf of Hugh M. McBeath; Rudolph L. Ennis, Esq. (McCampbell & Young) on behalf of Responsive Chord Communications, Ltd. and Charles E. Dziedzic, Esq. on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

## INITIAL DECISION OF

## DEPUTY CHIEF ADMINISTRATIVE LAW JUDGE JAMES F. TIERNEY

Issued: July 24, 1985; Released: July 30, 1985

### *Preliminary Statement*

1. In *Hearing Designation Order*, (MM Mimeo No. 661), released November 14, 1983, there were ten mutually exclusive applicants for the captioned FM facilities, Channel 294C, at Midland, Texas. Following settlement efforts, voluntary and other motions to dismiss, there remains but two surviving applicants at bar, Hugh M. McBeath (McBeath) and Responsive Chord Communications, Ltd. (Responsive Chord).

2. All other issues having been otherwise mooted or deleted, the customary standard comparative issue remains to be decided, i.e.:

a. To determine which of the proposals would, on a comparative basis, best serve the public interest.

b. To determine in the light of the evidence adduced pursuant to the foregoing issue, which of the applications should be granted, if any.

Also comprehended under the comparative issue is the comparative coverage issue, in a word, because of the significant difference in the size of the areas and population to receive service from the parties' proposals, thus, the areas and population which would receive FM service of 1 mV/m or greater intensity, together with the availability of the primary aural services must also be determined.

3. Prehearing conferences were held on February 6, June 24 and August 13, 1984 and January 25, 1985. Hearing was held April 2, 1985, and the record was closed on that date. Timely Proposed Findings of Fact and Conclusions of Law were filed June 14, 1985; Reply Findings were filed June 28, 1985.

4. For the reasons set forth hereunder, this, as an Initial Decision, SHALL GRANT the application of Responsive Chord Communications, Ltd.; consequently, the application of Hugh M. McBeath MUST BE DENIED.

## *Findings of Fact*

### *Hugh M. McBeath*

5. McBeath is an individual applicant who will own and manage the proposed FM station devoting full-time to its management and operation. McBeath has devoted his full-time to the management and operation of station KJBC, a daytime-only standard broadcast station in Midland, Texas. The licensee of KJBC is now apparently KJBC, Incorporated in which Mr. and Mrs. Hugh McBeath are each 50% shareholders (Tr. 109). Should Mr. McBeath be granted the license here, he proposes to turn station KJBC "over to Mrs. McBeath on a full-time basis" (McB Ex. 1). She will be responsible for the day-to-day operation of that station and will "hire and fire, schedule programs, adopt format," etc. (McB — Proposed Findings, para. 7).

6. McBeath was born on September 2, 1918, in Abilene, Texas, and he attended public school there. He studied engineering for five years at Hardin Simmons, Rice Institute, University of

Texas, and at Texas Tech University. McBeath has held an FCC First Class radio telephone permit for 35 years. McBeath has installed or rebuilt 7 radio broadcast stations; KRBC-FM and KWKC, Abilene; KMLW, Marlin; KXOL, Ft. Worth; KSTD, Breckinridge, KERC, Eastland, and KJBC, Midland, all Texas (McB Ex. 1).

7. McBeath has been a member of the Rotary Club for 33 years, and in the past has served as president. "He has been a scout leader for 30 years, committee chairman, neighborhood commissioner, sponsor or representative (Rotary Club sponsors II troups). Originated Scout uniform drive through local radio stations and served as chairman of drive for five years" (McB Ex. 1).

8. McBeath is a member of the Texas Association of Broadcasters and has served on the Association's Board for six years. The Association also has named him as the "state emergency broadcast coordinator for Texas." McBeath is a member of the National Association of Broadcasters (McB Ex. 1).

*Margaret Laverne McBeath*

9. Margaret McBeath is wife of Hugh McBeath, individual applicant, and upon grant of the permit to Hugh McBeath for the FM broadcast station at Midland, will assume management of daytime radio station KJBC, Midland, on full-time basis. She has served as Office Manager, Operations Manager, Credit Manager and Comptroller of the station. In these positions, she handles all the political contracts and schedules the advertising, most agency purchases and scheduling. She supervises all office employees of KJBC. She has also served as Treasurer of KMLW, Marlin, Texas and Office Manager of KSTB, Breckenridge, Texas. She assumes the responsibility of Station Manager at KJBC when Hugh McBeath is away. (As wife of Hugh McBeath, she has community interest rights in station KJBC, and will likewise in the requested FM broadcast station.)

10. Margaret McBeath has had considerable business experience as bookkeeper to Credit Manager, Montgomery Ward; Office Manager, Goodyear store, Graham, Texas; Chief Cashier, Pacific Finance, Abilene; and Billing Department Head, City of Abilene.

11. She is a member of the Anomey Book Club, a social club that meets once a month. She has been appointed four-year member of the Midland Welfare Board, Committee for Battered Children. She has served as president of PTA twice; and member of City Council PTA; awarded lifetime membership in PTA.

12. She has served as a volunteer in museum of the Southwest; served on federal jury; she is a member of Permian Basin Ad Club; served as Cub Scout Den Mother while her two sons — now 29 and 24 years of age — were young. She is a member of the First Baptist Church, Midland, where she is Outreach leader of Sunday School Class. Her activities have kept her in contact with community activities and problems, and as such, she has been a considerable assistance in the operation of KJBC (McB Ex. 2, Tr. 133, 114).

*Responsive Chord Communications, Ltd.*

13. Responsive Chord is a Texas limited partnership. Its principals are:

| *Name* | *Nature of Interest* | *Percentage of Ownership* |
|---|---|---|
| Steven L. Wood | General Partner | 9.56% |
| John W. Harrell | General Partner | 8.69% |
| George A. Veloz | General Partner | 13.04% |
| Richard L. Moore | Limited Partner | 25% |
| D. Lloyd Henderson | Limited Partner | 19.86% |
| William H. Jowell | Limited Partner | 3.97% |
| Estate of G. B. Morgan, Deceased, John H. Morgan, Executor | Limited Partner | 3.97% |
| David G. Wiles | Limited Partner | 11.92% |
| Mary Lou Cassidy | Limited Partner | 3.97% |

(RCC Ex. 1).

14. Complete control of the partnership and the conduct of its business afffair is vested equally in the three general partners (RCC Ex. 1).

15. All of the partners of Responsive Chord either reside or have resided in Midland, Texas. Steve L. Wood resided in Midland, Texas, from June 1975 to December 1981 and again from July 1982 to September 1983. Mr. Wood now resides in Odessa, Texas, which is within the proposed coverage of the station planned by Responsive Chord. Should the construction permit of Responsive Chord be granted in this proceeding, Mr. Wood then will move his residence immediately to Midland, Texas (RCC Exs. 1 and 3).

16. John W. Harrell resided in Midland, Texas, from 1956 to June 1971, and again from July 1973 to January 1978. Mr. Harrell returned to Midland, Texas, once more in August, 1981, and remained there until July 1982. Should the construction

permit of Responsive Chord be granted, Mr. Harrell will move to and reside in Midland, Texas (RCC Exs. 1 and 4).

17. George A. Veloz has resided in Midland, Texas, continuously since May 1951 (RCC Exs. 1 and 2).

18. The limited partners in Responsive Chord have all resided in Midland, Texas, for varying periods of time. One limited partner, G. B. Morgan, died on June 4, 1984, during the pendency of this proceeding. She had resided in Midland, Texas, for 20 years. Her husband, now the executor for her estate, J. H. Morgan, too, has resided in Midland, Texas for 20 years (RCC Ex. 1).

19. Responsive Chord has no interest of any kind in any broadcast station or application therefor, nor in any other medium of mass communication. A limited partner, Richard L. Moore, is a 30% shareholder in Citimedia Corporation, licensee of KIIZ(AM) and KIXS(FM), Killeen-Temple, Texas. Should Responsive Chord be the successful applicant in this proceeding, Mr. Moore will divest his interest in Citimedia Corporation prior to the commencement of program tests. No other partner in Responsive Chord has an interest of any kind in any other broadcast station or application therefor, or in any other medium of mass communication (RCC Ex. 1).

20. Responsive Chord proposes to use auxiliary power generating equipment at both its transmitter and studio locations, so as to ensure continued broadcast service to the listening audience in the event of either a generalized or localized power failure affecting either or both studio or transmitter operations (RCC Ex. 1).

21. George A. Veloz will serve as General Manager of the FM broadcast station proposed by Responsive Chord. He will serve in that position on a full-time basis, "devoting no less than 40 hours per week in that capacity for an indefinite period of time." As General Manager, Mr. Veloz will assume responsibility for supervision of all phases of station operation, including overall supervision of performance of station employees of their assigned duties. Specifically included in Mr. Veloz's tasks will be the ultimate responsibility for all aspects of station operations, including final responsibility for the the protection of the station's license and the formulation of long-term station policies and goals. In the formulation of long-term station policies and goals, George Veloz will work closely with the other two general partners of Responsive Chord, Steve L. Wood and John W. Harrell (RCC Ex. 2).

22. Mr. Veloz is an Hispanic American, being born on August 12, 1947, in Nueo Laredo, Tamps, Mexico, to parents of Spanish heritage. Mr. Veloz also speaks Spanish (RCC Ex. 2).

23. From 1970 to 1981, Mr. Veloz was a member of the Midland East-Side Lions Club, serving as Secretary and Treasurer in 1972, and as President from 1974 to 1976. In 1975, the Club honored Mr. Veloz as Lion of the Year. From 1975 to 1981, Mr. Veloz served as an elected Commissioner, City of Midland. From 1976 to 1979, Mr. Veloz served as Director on the American Human Relations Council. From 1977 to 1979, Mr. Veloz served as a Director of the Office of Minority Business Enterprises, Midland, Texas. Also from 1977 to 1979, Mr. Veloz served as a Director for the Midland United Way. In 1978, Mr. Veloz served as a member of the Midland Memorial Fund. From 1978 to 1982, Mr. Veloz served as Director of the Midland Chamber of Commerce. He served as a member of the Midland Memorial Fund. He served as a Trustee for Midland Memorial Hospital from 1978 to 1983. On the national level, Mr. Veloz served as Councilman on the National Advisory Council for the Small Business Administration from 1975 to 1980. In 1979, Mr. Veloz received the award from the Small Business Administration, Small Business Person of the Year. In 1980, Mr. Veloz was a participant in the White House Conference on Small Business (RCC Ex. 2).

24. For a period of six months ending in 1980, Mr. Veloz was General Manager of KJJT(AM), Odessa, Texas; and, at the same time, he also served as a Director of the then corporate licensee of KJJT(AM). In 1978 and 1979, KJJT(AM) made application to the Commission concerning the sale of that station. At that time, Mr. Veloz assisted in the preparation of a construction permit application and application for license made to the Commission (RCC Ex. 2).

25. Steve Wood will serve as Station Manager of Responsive Chord's proposed station, indefinitely, on a full-time basis, "devoting a minimum of 40 hours per week in the discharge of his responsibilities as Station Manager." In his position as Station Manager, Mr. Wood wil be responsible for day-to-day station operations, with particular emphasis on the business and administrative affairs of the proposed facility, including the responsibility for the implementation of Responsive Chord's Equal Employment Opportunity program. He will report directly to the General Manager Mr. Veloz. Mr. Wood also will implement, on a day-to-day basis, station policies adopted by the General Manager and

the general partners of Responsive Chord. Steve Wood, as a general partner of Responsive Chord, actively will be involved in the formulation and adoption of station policies in all areas (RCC Ex. 3).

26. Mr. Wood was born on June 29, 1948, in Lemesa, Texas. From 1967 to 1971, Mr. Wood attended Wayland Baptist College and received a Bachelor of Arts degree in Speech from that school. From 1973 to 1974, Mr. Wood attended West Texas State University, receiving a Master of Arts degree in Speech and Theater from that institution after completing a 2-year program, with thesis, in just 13 months. While attending West Texas State University, Mr. Wood served as a Recording Engineer for the Speech Department (RCC Ex. 3).

27. Mr. Wood has broadcast experience dating back to June 1973, when he was employed full-time as Station Manager of KWTS(FM), a broadcast station owned by West Texas State University. Mr. Wood remained employed there until July 1974. During this same period of time, Mr. Wood also was employed part-time as News Director of KCAN(AM) in Canyon, Texas. In December, 1975, Mr. Wood commenced employment full-time at KNFM(FM) in Midland, Texas, as a disc jockey. During his employment at KNFM(FM), Mr. Wood sequentially held positions, also as salesman, and newsman, leaving the station's employ in 1978. While employed at KNFM(FM), Mr. Wood and the station won awards from United Press International and the Texas Association of Broadcasters for excellence in news programming (RCC Ex. 3).

28. In September 1983, Mr. Wood formed his own comapny, ESM Enterprises, Inc., as a broadcast consultant to KZIP(AM) in Amarillo, Texas. Should Responsive Chord's construction permit be granted, the contract provides that it can be terminated immediately by Mr. Wood upon the occurrence of that event, and Mr. Wood will do so. On June 1, 1984, ESM Enterprises, Inc., contracted with L&T Enterprises, Inc., owner of KJJT(AM) in Odessa, Texas to assist in the restructuring of that station. That contract also provides that it may be terminated immediately by Mr. Wood, and Mr. Wood will do so, should Responsive Chord be granted the construction permit in this proceeding (RCC Ex. 3).

29. In 1977 and 1978, Mr. Wood worked as a volunteer with the Midland Muscular Dystrophy Association during its telethon. In 1977, Mr. Wood worked as a volunteer with the Christmas in April Program in Midland, Texas. In 1980, Mr. Wood served as

Publicity Chairman for the Midland County Epilepsy Association. Mr. Wood also has assisted Midland Community Theater in the publicizing of its fund-raising efforts from 1976 through 1982, and he has continued to participate (both as technician and actor) in a number of the theater's productions since ending his one-year employment with the theater in December 1975. In 1980, Mr. Wood conducted a Public Speaking Seminar for the adult classes at First Baptist Church, Odessa, Texas (RCC Ex. 3).

30. John A. Harrell will serve as full-time Program Director for Responsive Chord's proposed broadcast station, "and he will devote a minimum of 40 hours per week in that position for an indefinite period of time." As Program Director, Mr. Harrell will be responsible for the supervision of, and will have actual participation in, the acquisition, selection, and placement of programming on the proposed station, as well as supervise, on a day-to-day basis, the activities of all station employees within the Programming and Production Department of the proposed station. As a general partner of Responsive Chord, Mr. Harrell will participate in establishing the goals and policies of the proposed station (RCC Ex. 4).

31. Mr. Harrell was born on July 19, 1952, in Pecos, Texas. In June 1970, Mr. Harrell graduated from Midland High School, Midland, Texas. From June 1971 through July 1973, Mr. Harrell served two years active duty in the United States Navy. Aside from the active duty, from June 1970 until April 1976, Mr. Harrell served in the United States Navy Reserve. From July 1973 until January 1975, Mr. Harrell attended the Odessa Junior College, Odessa, Texas. From January 1975 until January 1978, Mr. Harrell attended Midland College (now, Midland Junior College) where he received an Associate of Arts degree in Social Psychology from Midland College. From January 1978 until June 1981, Mr. Harrell attended the University of Kansas, receiving Bachelor of Art degrees in (1) Journalism, Science and Broadcast Management, and (2) Social Psychology (RCC Ex. 4).

32. Mr. Harrell commenced his broadcast experience at KNFM(FM) in Midland, Texas, in October 1974. From that date until 1978, he was employed full-time at the station as a disc jockey. From 1975 to 1978, Mr. Harrell was Public Service Director of KNFM(FM) and its sister station, KNAM(AM). While attending the University of Kansas, Mr. Harrell was employed full-time at KJHK(FM), supervising a program staff of over 50 persons. In August 1981, Mr. Harrell returned to Midland, Texas, and full-time employment at the KNFM(FM) as a salesman,

leaving the station in July 1982. At that time, Mr. Harrell moved to Colorado Springs, Colorado to assume full-time employment as Production Director of KIIQ, a position he held until July 5, 1984. Until October 12, 1984, Mr. Harrell continued to work at KIIQ part-time (RCC Ex. 4). From March 1985 to the present, Mr. Harrell has worked full time as Production Director at KIKX(FM), formerly KIIQ, Colorado Springs, Colorado, working there full-time at 40 or more hours per week. (Tr. 141-142).

33. While in high school in Midland, Texas Mr. Harrell lettered three years in the Midland High School marching symphonic band. At that time he also was active in Teens Aid the Retarded, an organization that heightens community awareness of the abilities of mentally retarded teenagers. While in the United States Navy Reserve, Mr. Harrell was involved in the Toys for Tots program: June 1970 through June 1971; and July 1973 through April 1976. In 1973, Mr. Harrell worked actively on the campaign to heighten community awareness of services provided by Midland's new Mental Health and Mental Retardation center by producing a one-hour videotaped program about the Center's services for broadcast on the local cable system access channel. While at Midland College, Mr. Harrell helped found, and recruited members for, the Midland College Chapter of the Junior Jaycees. Also, in 1975, Mr. Harrell worked in the fund-raising efforts for the Midland Community Theater, a new community theater facility constructed in Midland, Texas in that year. In March 1976, Mr. Harrell assisted in publicizing the League of Women Voters (Midland Chapter) in the debates held by that organization in the 1976 local elections. Also in 1976, Mr. Harrell became involved in the fund-raising efforts of the Midland Chapter of the Muscular Dystrophy Association. These efforts with the Muscular Dystrophy Association were repeated in April 1977 (RCC Ex. 4).

### *Comparative Coverage*

34. McBeath proposes a facility which, within its 1 mV/m contour, will serve a population of 196,841; and an area of 3,609 square miles. Within its 1 mV/m contour, Responsive Chord proposes to serve a population of 227,328 and an area of 5,065 square miles (Jt. Eng. Ex.).

35. As to differentials in daytime aural services, Responsive Chord will provide a fourth such service to a population of 4 encompassing an area of 1.2 square miles. McBeath will provide no such fourth service. Responsive Chord will provide a fifth daytime aural service to 163 persons encompassed in an area of

158.8 square miles, while, again McBeath will provide no such service. Responsive Chord will provide a sixth daytime aural service to 31,185 persons encompassing an area of 1,461 square miles. McBeath will provide a sixth such service to 865 persons encompassed within 166 square miles (Jt. Eng. Ex.).

36. Respecting nighttime aural service, Responsive Chord will provide the first such service to 288 persons encompassed within 308 square miles, while McBeath would provide first nighttime aural service to 5 persons located in 1 square mile. Responsive Chord proposes to provide a second nighttime aural service to 226 persons encompassed in 197 square miles, while McBeath would provide a second nighttime aural service to 15 persons encompassed within 27 square miles. Responsive Chord would provide a third nighttime aural service to 86 persons located within 39 square miles, while McBeath would provide a third nighttime aural service to 5 persons within 7 square miles. Responsive Chord proposes to provide a fourth nighttime aural service to 12,911 persons encompassed with 121 square miles, while McBeath's proposal would provide a fourth nighttime aural service to 3 persons encompassed within 7 square miles. Responsive Chord's proposals would provide a fifth nighttime aural service to 10,567 persons encompassed within 173 square miles, while McBeath's proposal would provide a fifth nighttime aural service to 13 persons encompassed in 25 square miles (Jt. Eng. Ex.).

### *Ultimate Findings and Conclusions*

37. Established policy and precedent in these proceedings are grounded in two primary objectives: the best practicable service to the public, and a maximum diffusion of control of the media of mass communications. *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965).

### *Diversification of Control*

38. McBeath is the licensee of a daytime-only AM station in Midland, Texas, the city of license of the proposed FM station here; Responsive Chord has no other cognizable media interests. The broadcast interest held by Richard Moore, a limited partner in Responsive Chord, will be disposed of should Responsive Chord be the successful applicant. Should McBeath prevail, he will turn over the management and operation [of his AM station] KJBC to his wife. As a last resort, McBeath will accept a grant of his FM application subject to the disposal of station KJBC with three

years of commencing program tests on the FM station (McB Proposed Findings at 7).

39. Having held his license in the proposed city of license here, Midland, Texas since 1966, McBeath argues that a grant of his application at bar "would remove the unfair disadvantage he presently experiences operating a daytime-only AM station in competition with three AM/FM combinations that provide full-time service in Midland with considerably greater power"; and that "[t]o foreclose McBeath from upgrading his broadcasting properties only because someone with no broadcast interest also applied for the same facilities would, in effect, be punishing McBeath for nineteen years of service to his listeners" (McB Proposed Findings at 22).

40. That is a tempting argument, evoking a compassionate pause; yet, the task at hand is to serve and apply effectively the policy and precedent extant reposing in the two primary objectives mentioned earlier; not certainly to make new policy, however compassionate the stated reasons. Without doubt, AM/FM combinations have been permitted, if not encouraged, over these many years. Indeed, in a case of some close familiarity where an applicant similarly situated with McBeath sought a stronger full-time standard broadcast facility rejected at all adjudicatory levels in this Commission, the U.S. Circuit Court for the District of Columbia saw fit to reverse and remand, among other reaons, in that the Presiding Judge and the Review Board "simply took for granted" that the incumbent licensee would remain a competitor if the competing applicant were granted.[1] (*Cf. Julie P. Miner* v. *FCC*, No. 78-1903, Cir. Ct. D.C., December 1, 1980 at 12); that the findings are "not sufficient in number and substance to support the conclusion"; that the FCC has not engaged "in reasoned decision-making," because it has not taken a "hard look at the 'salient problem' of equitably fostering competition such as those filed by the applicants" (*Id.* at 13).

41. The Court in *Miner* also observed that the diversification objective "may be a commendable goal," that goal must be achieved in a fair way "and not require, the existing licensee to overcome an insurmountable burden of proof — as to what will happen to both the old and new station depending upon who is licensed to operate the more desirable" (*Id.* at 12, 13). The record

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[1] The Court in *Miner* may have overlooked or ignored the fact that *Miner*, whatever the ultimate disposition, would have still owned and retained the Miner FM station (KDXU-FM) in the proposed city of license, St. George, Utah.

in *Miner* did not address such question, noted the Court, "but only supposition" (*Id.*).

42. Here, there is no supposition but unequivocal record evidence, that McBeath not only would remain the licensee (or perhaps a corporation he and his wife control) but would remain, even under a proposed stipulated condition, "three years after commencing program test on the AM station." This condition neither "neutralizes any diversity demerit," as McBeath would have it, nor does it invoke notions of equity; rather, it worsens a bad comparative condition. Clearly then, on the grounds of diversification, "a factor of primary significance," the evidence demonstrates a substantial preference for Responsive Chord. (*See also Muncie Broadcasting Corporation*, 89 FCC 2d 123 (Rev. Bd. 1982); *Brownfield Broadcasting Corporation*, 93 FCC 2d 1197 (Rev. Bd. 1983).

### *Best Practicable Service*

#### *McBeath*

43. McBeath states that he will own and manage his proposed station "full-time." Responsive Chord would challenge that intention to so serve by noting that the record is "utterly devoid" of any explanatory reference in this regard adding that there would be no doubt McBeath intends to devote "*some*" time. Because McBeath's proposal is "simply too vague" adds Responsive Chord, he cannot be credited with a promise of full-time participation. McBeath who is presently occupied in the management and operation of his KJBC station stated, if successful here, he would hand over all his responsibilities there to his wife and assume "full-time duties at his proposed FM station."

44. Without a more reasonabale explanation or breakout of intended actual hours — full-time being credited historically only when a minimum of 40 hours per week is planned — Responsive Chord, citing among others, *Vacationland Broadcasting Co., Inc.*, 55 RR 2d 1299, 1305 (Rev. Bd. 1984), argues that McBeath's unexplained "full-time" cannot be credited as such. In *Vacationland* the Review Board noted that generalized statements such as "full-time" without more were acceptable on earlier occasion as comprehending a minimum of 40 hours weekly participation, but that specific evidence, rather than generalizations, make for better policy. "Therefore, the Board takes this opportunity to announce that in the future it will expect applicants to specifically state in their direct written cases the

precise hour-per-week commitment proposed for each integrated principal. Failure to provide this information or substantial justification for its absence may lead to denial or diminution of the integration credit sought" (*Id.* at 1304).

45. In his Reply Findings, McBeath repeats his proposal of "full-time" integration and "is backed up by his many years of devotion to the management and operation of his Midland daytime-only station. The old saying that actions speak louder than words is applicable here. Nowhere in his Reply does McBeath give the intended metes and bounds of his planned "full-time" integration in terms of hours.

46. In *Vacationland, supra,* applicants were put on affirmative notice that precise "hour-per-week commitment" was to be specifically set forth in direct written case; this McBeath has failed to do. The Review Board, however, provided an avenue of proportionate relief from that strict mandate were an applicant failing, as here, to provide an offsetting "substantial justification" for his failure. Although represented by competent veteran counsel who may have by the universal imperfection of occasional oversight or error, indulged the misgiving of imprecision, the whole thrust of the evidence, both written and testimonial, however brief, of McBeath would, in elemental fairness, barely, but safely, reach the sanctuary of expected "substantial justification"; "full-time"; integration meant and means to McBeath, it reasonably appears, whatever would be expected and demanded of him under rule, policy or precedent extant, albeit not precisely articulated to the minimum expected, not less than 40 hours per week. Under these conditions, the imperfection noted would not undermine McBeath's being credited with 100% full-time integration.

47. Concerning his diversification posture which earlier has been found greatly wanting, McBeath, in his Reply, relies on Docket No. 84-231; (after much search by the forum, apparently *Second Report and Order*, FCC 85-124, released April 12, 1985). He states that the Commission action supports his thesis that a daytime-only AM within three years of program test authorization of the proposed FM station "deletes any preference that Responsive Chord may claim on the basis of diversification (fn. 16) as McBeath made an offer of proof to pledge to divest himself of his AM daytime-only station within 3 years" (McB Reply Findings, p. 1, para. 3).

48. Responsive Chord refutes that thesis noting that "the McBeath application never proposed or stated that McBeath would dispose of station KJBC in Midland, Texas at any time or under any condition. Moreover, the hearing record in this proceeding is utterly devoid of any representation by McBeath that he would agree to disposing of station KJBC at any time or under any condition" (RCC— Reply Findings at p. 2, para. 2). More importantly, McBeath badly misreads the imperfectly described *Second Report and Order*, *supra*, where in referring to the "new" policy concerning daytime-only AM applicants for FM facilities the Commission stated:

> This new policy shall apply to all future comparative proceedings *involving FM applications filed, but not yet designated for hearing, as of the effective date of this Order.* (*Second Report and Order*, *supra*, at p. 7, para. 20) (Emphasis added).

Thus, as earlier found, McBeath must be and is assessed a substantial demerit respecting diversification which in relationship to "the best practicable service" comparative criterion "is of primary significance" (*Id. Second Report and Order*, p. 6, paras. 18 and 19).

### *McBeath and Responsive Chord: Integration Qualitative Comparison*

49. McBeath has resided in Midland, Texas for approximately 20 years; thus, a cognizable enhancement can be accorded him for local residence. His civic involvement would comprehend long-time membership and office in the Rotarians and a scout (Boy Scouts of America, presumably) for 30 years. While limited in scope, these activities are, at least, cognizable, if not extensive. McBeath claims no minority enhancement but does have extensive — 20 years — of broadcast experience in view of his ownership and management of station KJBC. While all three of Responsive Chord's general partners can claim some broadcast experience, McBeath's, comparatively, is greater in both length and breadth of experience.

### *McBeath and Responsive Chord — Comparative Coverage*

50. A comparison of the areas and populaton to be served reflects that Responsive Chord will serve a 15.5% greater population and 11.7% greater area. Respecting new daytime aural service, Responsive Chord will provide a fourth new daytime aural service to "four persons" in an area of 1.2 square miles; McBeath

will provide no such new service. Responsive Chord also will provide a fifth new daytime aural service to 163 persons in an area of 158.8 square miles, while McBeath will provide no new fifth aural daytime service.

51. Regarding new nighttime aural service, the differences are clearly greater. Responsive Chord will provide a first nighttime aural service to "58 times" more population and "308 times" more area than the McBeath proposal; Responsive Chord will provide a new second aural nighttime service to "15 times" the population and "7.3 time" the area than McBeath (RCC Chord—Proposed Findings at 21). The third, fourth and fifth aural nighttime services differences favoring Responsive Chord, to use its words, "become astronomical." In sum, on comparative coverage grounds, Responsive Chord would be and is entitled to a significant preference for superior comparative coverage. *See ABC Incorporated*, 95 FCC 2d 256, 261 (Rev. Bd. 1983).

### *Auxiliary Power — McBeath and Responsive Chord*

52. Responsive Chord has proposed to utilize auxiliary power at both its studio and transmitter site. McBeath does not. Accordingly, Responsive Chord is entitled to a very slight preference under the auxiliary power criterion of the standard comparative issue. *Addendum to Policy Statement on Comparative Broadcast Hearings*, 2 FCC 2d 667 (1966); *New Continental Broadcasting Company*, 88 FCC 2d 830, 851 (Rev. Bd. 1981).

### *Responsive Chord — Diversification and Best Practicable Service (Integration of Ownership and Management)*

53. Responsive Chord has no cognizable mass media interests save for the sole broadcast interest held by Richard Moore, a limited partner, which is adequately addressed in a timely made and credited commitment to dispose of such interest should Responsive Chord prevail here. To repeat, under the evidence, Responsive Chord's preference on this important criterion over McBeath is clear and substantial. *Cf. Muncie Broadcasting Corporation*, 89 FCC 2d 123, 129–130 (Rev. Bd. 1982).

### *Integration of Ownership and Management (Responsive Chord)*

54. Responsive Chord is a limited partnership under the full control of its general partners, George A. Veloz, Steve L. Wood and John A. Harrell. These general partners are proposed to serve, respectively, as General Manager, Station Manager and

Program Director of Responsive Chord's proposed station. The three general partners propose to work at the station for an indefinite period and for a minimum of 40 hours per week. Under abiding precedent, this forum of partnership, where general partners exercise complete authority in the enterprise and where each general partner is committed to a minimum of 40 hours-per-week in the operation of the partnership enterprise is entitled to 100% full-time integration of ownership and management. *Central Texas Broadcasting Company, Ltd.*, 90 FCC 2d 583, 585, 589 (Rev. Bd. 1982).

### *Responsive Chord — Qualitative Factors (not otherwise addressed)*

55. Responsive Chord would have it that each applicant here would be "roughly equal" on the matter of local residence; one of its general partners (Veloz) has resided in Midland, Texas for 24 years, another (Wood) residing in Midland for "almost 8 years" and a "year or so" in nearby Odessa, and the third general partner (Harrell) residing in Midland for but 22 years; and "not an unimportant fact," says Responsive Chord, all of the limited partners who reside in Midland, Texas. Little quarrel can be had with Responsive Chord's characterization of "roughly equal" and that is the conclusion on that factor of comparative enhancement.

### *Civic Activities*

56. Under the findings earlier, the civic participation of the three general partners seem fairly extensive both in terms of civic activities performed as well as duration. Though some cognizable civic participation can be attributed to McBeath, it seems, under the evidence, greatly less than the principals of Responsive Chord. To that extent and though not of critical weight here or in the *Policy Statement*, *supra*, Responsive Chord would be and is entitled to a moderate enhancement over McBeath in this comparative category.

### *Minority Status*

57. McBeath as an individual applicant claims no minority enhancement, while one of the three general partners of Responsive Chord, Veloz, is an Hispanic American. At times in these proceedings, it seems necessary to pursue refinements of the most searching order to arrive at comparative choice. Under abiding precedent for its 1/3 Hispanic general partner, Responsive Chord is entitled to a further enhancement, again cognizable and of moderate weight over McBeath.

58. In summary, then, while McBeath has been accorded 100% full-time integration of ownership and management, on grounds virtually at the brink of non-persuasion, he falters badly in the critically important factor of diversification for the reasons set forth in detail earlier. On that notion alone, Responsive Chord must win the day here. Were that not enough, while McBeath is entitled to enhancement for his greater broadcast experience, Responsive Chord is his better in other enhancement factors under the "best practicable service," including civic activities, minority status of one general partner as well as for its proposal auxiliary power at its proposed facilities in Midland, Texas.

Accordingly, for the foregoing reasons and the interest of the public so warranting, the application of Responsive Chord Communications, Ltd. for the captioned facilities at Midland, Texas may be AND IS HEREBY GRANTED; that being so, the applicaiton of Hugh M. McBeath for those same facilities must be AND IS HEREBY DENIED.[2]

IT IS SO ORDERED.

FEDERAL COMMUNICATIONS COMMISSION

JAMES F. TIERNEY, *Deputy Chief Administrative Law Judge*

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[2] In the event exceptions are not filed within 30 days after the release of this Initial Decision and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Rule 1.276(d) (47 CFR 1.276(d)).

**CATV Program Exclusivity, Network Programming**
**CATV Special Relief**
**Remand From Court of Appeals**
**Rules, Waiver**

> **Following remand from Court of Appeals, granted request for waiver of significantly viewed exemption to network program nonduplication rules. Local station demonstrated by use of audience viewing data that distant station has not met significant viewing standards for five years.**
> **—*KCST-TV, Inc.***

**FCC 86-50**

## BEFORE THE

# FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re:

| | |
|---|---|
| KCST-TV, INC.<br>Petition for Special Relief | CSR-1270 |

## MEMORANDUM OPINION AND ORDER

Adopted: January 21, 1986; Released: January 27, 1986

BY THE COMMISSION:

### *Introduction*

1. This proceeding, brought by KCST-TV, Inc. (hereinafter "KCST-TV"), licensee of Station KCST-TV (NBC, Channel 39), San Diego, California, is now before the Commission on remand from the United States Court of Appeals for the District of Columbia Circuit, pursuant to the court's decision in *KCST-TV, Inc. v. FCC*, 699 F.2d 1185 (D.C. Cir. 1983).

2. In April 1978, KCST-TV requested stay and waiver of Section 76.92(g) of the Commission's Rules. Absent the requested relief, the simultaneously duplicating network programming of Television Broadcast Station KNBC (NBC, Channel 4), Los Angeles, California, would be exempted from nonduplication

blackouts on cable systems within KCST–TV's 35-mile specified zone. The Bureau Chief denied stay on October 5, 1978. One week later, however, the United States Court of Appeals for the Fourth Circuit stayed the effectiveness of Section 76.92(g) of the Commission's Rules, but the court later upheld the adoption of the rule. *Spartan Radiocasting Company v. FCC*, 619 F.2d 314 (4th Cir. 1980). The judicial stay terminated on May 29, 1980. In June 1981, the Acting Bureau Chief denied KCST–TV relief. *KCST-TV, Inc.* (San Diego, California), Mimeo No. 001420, 49 RR 2d 1118 (1981). The Acting Chief found that KCST–TV had not addressed the question of economic impact to it from application of the rule, as the Commission's policies required,[1] but instead argued that KNBC was no longer significantly viewed in San Diego County. The full Commission unanimously denied review in October 1, 1981, upholding the Chief's analysis. *KCST-TV, Inc.* (San Diego, California), 88 FCC 2d 48 (1981).

3. In January 1983, the United States Court of Appeals for the District of Columbia Circuit, in a 2–1 decision, set aside the Commission's order. *KCST-TV, Inc. v. FCC*, 699 F.2d 1185 (D.C. Cir. 1983). While assuming the validity of the Commission's rules and policies generally, the court held that "section 76.92(g) has no logical application in the face of a showing that a distant station is not significantly viewed, and we find no apparent policy basis for requiring a showing of economic impact before considering evidence of lack of significant viewing." *Id.* at 1195 (footnote omitted). The court remanded the case to the Commission for proceedings not inconsistent with the court's opinion. Following denial of rehearing by the court, KCST–TV filed a supplement to its petition for special relief.

### *KCST-TV's Supplement*

4. KCST–TV, in its supplement, argues that the most recent Arbitron data demonstrate that the station's request for relief is now even more compelling. Previous Arbitron surveys, which formed the basis of KCST–TV's petition, showed that KNBC's

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[1] In making provision for special relief for broadcasters seeking exemption from Section 76.92(g), the Commission stated that "the burden now has shifted to the broadcast licensee seeking nonduplication protection against a significantly viewed signal. A petitioning licensee will be expected to present persuasive justification. Insofar as economic impact is concerned, this shifts the burden to the party possessing the licensee financial information." *Memorandum Opinion and Order in Docket No. 19995*, 57 FCC 2d 1303, 1305 (1978), *recon. denied*, 68 FCC 2d 1461 (1978), *aff'd sub nom. Spartan Radiocasting Company v. FCC, supra.*

net weekly circulation in San Diego County ranged from 22% (1977) to 24% (1976, 1979, 1980).[2] Similar surveys show that KNBC's net weekly circulation declined to 19% in 1982 and to 18.5% in 1983. A special Arbitron survey of non-cable homes located wholly or partially within KCST-TV's 35-mile specified zone, commissioned by the station, as it had also done in 1980, reveals that KNBC's net weekly circulation in 1983 in the zone was 18.8%.[3] Each of these figures, notes KCST-TV, is below the 25% figure which a network affiliate such as KNBC must achieve to be significantly viewed. *See* 47 C.F.R. Section 76.5(k).[4] Even adjusting the 1982 and 1983 figures for sampling error, states KCST-TV, calculating the statistical deviation to two standard errors — a test more stringent than the one standard error required by the Commission — KNBC's net weekly circulation in San Diego County is between 17.7% and 19.3%, and is between 18% and 19.6% in KCST-TV's specified zone.

5. KCST-TV emphasizes that it seeks only a waiver of Section 76.92(g) of the Rules, and does not seek to have KNBC deleted from the Commission's original list of significantly viewed signals,[5] which could possibly expose cable systems to increased copyright liability for carriage of nonduplicative KNBC programming. No subscriber viewing patterns will be disrupted by grant of a waiver, contends KCST-TV, nor will grant of a waiver of Section 76.92(g) of the Rules have any effect on the number of petitions the Commission may receive pursuant to Section 76.54 of the Rules to declare additional stations to be significantly viewed. KCST-TV also notes the nature of the San Diego Area of Dominant Influence (ADI) itself, which comprises San Diego County alone, whose area is 4,261 square miles. Consequently, argues KCST-TV, reception of Los Angeles television stations may vary markedly between the northern portions of the county and its southern portions. KCST-TV particularly notes that all communities in its specified zone which are served by cable systems are located from 70 to over 100 miles south of Los Angeles, and most are clustered around San Diego itself. Moreover, states KCST-TV, approximately 75% of the area's cable subscribers are served by one of two major cable systems, and it

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[2] In 1981, KNBC's net weekly circulation in noncable households in San Diego County was 23%. Arbitron, *County Coverage Surveys, 1981, CATV-Controlled.*

[3] The 1980 survey showed KCST-TV's net weekly circulation in noncable households in the San Diego specified zone to be 23.7%.

[4] A network affiliate must also achieve a 3% share of viewing hours.

[5] *Reconsideration of the Cable Television Report and Order*, 36 FCC 2d 326, 378-463 app. B (1972).

is not likely that KNBC's off-air viewing levels vary significantly in these systems' service area. KCST-TV describes its audience viewing data as unusually strong, extensive, and unchallenged, and asserts that no other petitioner for similar relief has presented a similar showing, nor is it likely that many others could.

6. In addition, KCST-TV argues that the showing it submits achieves the purposes of the nonduplication rules. Community- or system-specific surveys are required, in most instances, states KCST-TV, by Section 76.54 of the Rules, which sets forth the procedures by which additional stations may be declared to be significantly viewed. However, argues KCST-TV, this rule was designed primarily to enable cable operators to carry particular stations, and was "keyed to the needs of cable operators in individual communities." The network nonduplication rules are, in contrast, "keyed to the needs of local stations," maintains KCST-TV, and operate within a station's 35-mile specified zone.[6] Conducting community- or system-specific surveys would be burdensome in both labor and expense, asserts KCST-TV, and, indeed, the data currently submitted is equivalent in any event to such system-specific data, given the unique nature of the San Diego market. Finally, contends KCST-TV, no discernible policy exists to require evidence of economic impact in the face of a showing that a signal is not significantly viewed, particularly because the court has already rejected these justifications of subscriber inconvenience, viewer disruption, administrative convenience, or inconsequence of the burden of making such a showing, citing *KCST-TV, Inc. v. FCC*, 699 F.2d at 1194-1195.

## *Discussion*

7. In remanding the instant case, the court stated that

> the Commission may wish to consider (1) whether any policy in fact justifies not examining evidence of significant viewing unless there is a showing of economic impact, (2) whether KCST must present community-specific data, as opposed to county-specific data, and (3) what viewing level KCST must demonstrate to prove that KNBC is no longer significantly viewed.

*Id.* at 1195 (footnote omitted). We also note that the court specifically stated that "the validity of the Commission's general policy of not deleting stations from the 1972 list . . . is not now before us." *Id.* at 1195 n. 21. Bearing these considerations in mind, we turn again to KCST-TV waiver request, as supplemented.

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[6] In certain cases, affecting smaller television market licensees, the rules' operation extends to such stations' 55-mile secondary zones.

8. In adopting Section 76.92(g) of the Rules, we stated that "we believe it is more accurate to view this as a local station versus local station situation," *Docket No. 19995*, 67 FCC 2d at 1305, in view of the significantly viewed nature of the arguably more distant station. We continue to believe this today, and do not understand this to be in dispute. A corollary of this belief, of course, as recognized by the court, is that a station that is not significantly viewed need not, for the purposes of the nonduplication rules, be viewed as a local station. The policy concerns which led us to refuse to examine audience data in waiver proceedings in this area, absent a showing of economic impact, have been rejected by the court. *KCST-TV, Inc. v. FCC*, 699 F.2d at 1194–1195. Accordingly, we turn to the showing made by KCST-TV in support of its waiver petition.

9. It is without question that the data submitted by KCST-TV, for the years and areas chosen, show that KNBC failed to achieve a sufficient net weekly circulation to be considered significantly viewed. Indeed, this is so even after statistical deviation is calculated to two standard errors, a level of probability which is greater than that which is required by our rules.[7] Initially, we see no reason today, nor has one previously been presented to us, to require a different viewing level by which significantly viewed status would be measured in waiver cases such as the one before us. In order to allay concerns over stations continually shifting back and forth over the boundary line between significantly viewed status and lack thereof,[8] our inquiry must focus not on some arbitrarily chosen higher levels of viewing, but rather on the period of time during which a station fails to meet established levels. It is a focus on the latter which will more accurately demonstrate that a station once found to be significantly viewed is in reality significantly viewed no longer, and not just experiencing temporary fluctuations in its audience. In the instant case, the audience viewing data submitted by KCST-TV demonstrates that KNBC has not met our significant viewing standards for at least five consecutive years (1979–1983) in San Diego County, and in

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[7] Only measurements to one standard error are required to demonstrate significantly viewed status for stations not on the Commission's 1972 list. 47 C.F.R. Section 76.54(b).

[8] This is a concern shared by the appellate court. *KCST-TV, Inc. v. FCC*, 699 F.2d at 1195 n. 22.

the San Diego 35-mile zone for two of those years (1980 and 1983).

10. We disagree, however, with KCST-TV's contention that community- or system-specific data should not be required in waiver cases such as the one now before us. Section 76.54 of the Rules, which requires community- or system-specific data as its underlying proposition, is geared, contrary to KCST-TV's allegations, to the needs of both television stations and also cable systems. KCST-TV has not shown that special surveys are too costly or burdensome; to the contrary, it has commissioned a special survey more than once in these proceedings. In addition, both our network program nonduplication rules — Section 76.92(g) of the Rules in particular — as well as our waiver process, operate on a community-by-community basis. *See also Report and Order in MM Docket No. 84-1296*, 58 RR 2d 1, 28 nn. 72, 74 (1985). As we stated previously,

> County-wide data was utilized by the Commission when the list of significantly viewed signals was established *because community-specific data was not available*, and was found sufficient '. . . to establish with certainty a base of signals meeting the test. . . .' *Reconsideration of the Cable Television Report and Order*, 36 FCC 2d 326, 348 (1972).

*KCST-TV, Inc.*, 88 FCC 2d at 51 (emphasis added). Community-specific data is, however, available today. Given the particular nature of the San Diego market, however, and the facts and circumstances of the instant case,[9] we feel that KCST-TV's data for that part of San Diego County within the San Diego 35-mile specified zone amounts to the system-specific or community-specific showing we would normally expect. As a consequence, we shall grant KCST-TV's request for waiver. KCST-TV is now entitled to nonduplication protection in the San Diego specified zone vis-a-vis KNBC.

11. We emphasize that our decision to grant KCST-TV's waiver request does not delete KNBC from our 1972 list of significantly viewed signals, and that our decision rests on the particular facts and circumstances before us. We will continue to take a hard look at all meritorious applications for waiver, though

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[9] KCST-TV's data show that KNBC has not met our significant viewing standards in San Diego County for five years. In two of those years, this was also the case in the San Diego 35-mile zone, and we see no reason to believe that this would not also be the case in the other three years. We further note that the City of San Diego is located toward the southern portion of the zone, farthest away from KNBC, and, therefore, a community-specific survey would likely show even less viewing of KNBC than KCST-TV's zone-wide analyses demonstrate.

we remind potential petitioners that, as the appellate court reiterated, citing *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), '[a]n applicant for waiver faces a high hurdle even at the starting gate.' Petitioners seeking a waiver of Section 76.92(g) of the Rules based on an allegation that a particular station is no longer significantly viewed will be expected to make such a demonstration utilizing community- or system-specific data, to one standard error, and will be expected to show that the station in question has not met our standards for significant viewing for two consecutive years. Of course, the possibility of obtaining a waiver of our rules based on harmful economic impact continues to remain available.[10]

12. In view of the foregoing, we find that grant of the waiver requested by KCST-TV is in the public interest.

13. Accordingly, IT IS ORDERED, That the "Contingent Petition for Stay and Special Relief" (CSR-1270) filed April 26, 1978, by KCST-TV, Inc. IS GRANTED to the extent noted above.[11]

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

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[10] While not particularly germane in the instant case (in which cable penetration in the San Diego ADI at the time the pertinent data was collected was about 40 percent), the penetraton rate of the cable system could be a factor in determining significantly viewed status. This was a concern raised by Judge Scalia. *KCST-TV, Inc. v. FCC*, 699 F.2d at 1199 (Scalia, J., dissenting). In appropriate circumstances, this will be a concern of the Commission in evaluating off-air viewing data submitted.

[11] KCST-TV's request for stay has previously been denied. *See* paragraph 2, *supra*.

Application, Amendment of, Right to File
Application, Not Acceptable for Filing
Mobile Radio Service, Cellular
Ownership, Common
Reconsideration, Petition for, Treated as Appropriate for Review
Rules, Failure to Conform

Order on Reconsideration adopted regarding the return of Round IV Cellular applications for miscellaneous defects referred to Commission in order to reach a final decision on acceptability for filing with a minimum of delay. Pre-lottery amendments to correct defects not allowed. Reconsideration denied concerning: 1) three applications which failed to comply with the 75 percent minimum 39 dBu contour coverage requirement of Section 22.903(a); and 2) one application which violated the multiple application ownership prohibition of Section 22.921. Reconsideration granted for: 1) five applications because of a misinterpretation of a pre-filing agreement; and 2) one application because the application defects did not appear in the copy of the application on file in the Commission's Cellular Public Reference Room.
—*MV Cellular, Inc.*

FCC 86-44

BEFORE THE

# FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

| In re | |
|---|---|
| Petitions for Reconsideration of the<br>Return of Round IV Cellular Applications<br>for Miscellaneous Defects | |

## ORDER ON RECONSIDERATION

Adopted January 17, 1986; Released January 24, 1986

BY THE COMMISSION:

1. Various Round IV cellular applicants seek reconsideration of

the actions of the Chief, Mobile Services Division, returning their applications as unacceptable for filing. The petitions for reconsideration have been referred to the Commission under Section 1.106(a)(1) of the Rules in order to expedite a final decision on the matters raised. The reasons for return of the applications listed in the Attachment are varied and somewhat unusual in that few Round IV cellular applications contained the cited defects. Thus, the listed applications could not be consolidated which are being issued simultaneously. However, since only four separate issues are presented, the listed applications have been consolidated for reconsideration herein.

## *Discussion*

### *A. MV Cellular, Inc., Omni Cellular Telephone Company of Oklahoma City, and Cellular Telephones, Inc.*

2. MV Cellular, Inc. (MV)[1] and Omni Cellular Telephone Company of Oklahoma City (Omni)[2] have filed identical Petitions for Reconsideration and Request for Waiver concerning the return of the non-wireline applications that they filed for the Colorado Springs, Colorado cellular market. Cellular Telephones, Inc. (CTI)[3] has filed a Petition for Reconsideration of the return of the non-wireline application that it filed for the Little Rock, Arkansas cellular market.

3. Pre-screening analysis of each of the three involved applications revealed identical defects. In each application there was a map which defined the applicant's CGSA as being coextensive with the MSA boundary except where the proposed 39 dBu contours extended beyond the MSA, in which case the CGSA was coextensive with the MSA and the 39 dBu contours outside the MSA. Each application also contained representations that the combined 39 dBu contours covered in excess of 80 percent of the total *population* of the involved MSA. None of the applications complied with the requirement of Section 22.903(a) of the Commission's Rules that cellular applicants *must demonstrate* that the combined 39 dBu contours of all base stations will cover at least 75 percent of the total *area* of the CGSA. Accordingly, by letters dated August 16, 1985 and September 11, 1985, all three applications were returned as unacceptable for filing because of the applicants'

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[1] File No. 33719-CL-P-117-A-84

[2] File No. 33612-CL-P-117-A-84

[3] File No. 30334-CL-P-92-A-84

Failure to provide demonstration that the combined 39 dBu contours of the base stations will cover at least 75% of the *area* of the CGSA. Public Notice, "Modification of Cellular Round IV Pre-Screening Policy", Report No. CL-304, released April 26, 1985; *Report and Order*, CC Docket No. 83-1096, FCC 84-150, Mimeo 34469, released May 24, 1984, at para. 68; Public Notice, "Commission Announces Cellular Markets Beyond 90 Largest". Report CL-69, May 17, 1984.

4. In their Petitions, MV and Omni argue that they misunderstood the Commission's rules and believed "that if the 39 dBu contours covered 75 percent of the population *or* the area of the MSA, the requirement that 75 percent of CGSA's area be covered by the 39 dBu contours was inherently met." CTI also misunderstood the rule since it "interpreted that if the 39 dBu contour covered over the required 75 percent of population or arera of the MSA, *as required by the CGSA*, the requirement of 75 percent of the CGSA's area by the 39 dBu contours was irrelevant." The Petitioners argue that their proposed systems comply with the Commission's purpose in adopting minimum coverage standards, and that the actual coverages proposed are comparable with other applications that were accepted in the involved MSA's. CTI argues that the Commission should employ a "substantially complete" acceptability standard allowing applicants to correct "small defects" and settle points of "professional differences" through amendment after the lottery. Finally, the Petitioners propose to reduce the sizes of their CGSAs through "minor" amendments.[4]

5. Section 22.903(a) has contained the requirement that cellular applicants must demonstrate that their combined 39 dBu contours will cover at least 75 percent of the total area of the CGSA since the rule was adopted in 1981.[5] In the *Cellular Lottery Rulemaking*, 98 FCC 2d 175(1984) (*Lottery Order*), we amended Section 22.903(a) to include the additional requirement that applicants must "define their CGSAs to include at least 75 percent of the population *or* 75 percent of the area of the MSA or NECMA for which they are filing." *Lottery Order*, *supra*, at 211. We also made it clear that there would be two separate and distinct minimum coverage requirements by stating: "Of course, we will continue to require each applicant to demonstrate that the combined 39 dBu contours of all base stations will provide coverage of at least 75 percent of the area of the CGSA, as

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[4] MV and Omni specifically request a waiver of Section 22.918(b) of the Commission's Rules to permit such an amendment.

[5] *See Cellular Communications Systems*, 86 FCC 2d 469(1981) (*Cellular Order*).

specified by Section 22.903 of the rules." *Lottery Order, supra*, at 211-212.

6. In light of the explicit wording of the two minimum coverage requirements in Section 22.903(a), and the separate development and statements concerning the two minimum coverage requirements, we do not believe that the Petitioner's misinterpretation of the rule requirements is reasonable. This conclusion is supported by the fact that only three applicants (whose applications appear to have been prepared by the same individual) out of the more than 5,000 Round IV applications filed did not recognize that there are two separate minimum coverage requirements.

7. In determining whether the requirement of Section 22.903(a) that applicants must demonstrate that their combined 39 dBu contours cover at least 75 percent of the area of the CGSA is met, the staff has looked to whether: (1) a statement of the area encompassed by the CGSA and composite contours is included; (2) a specific statement that the 39 dBu coverage exceeds 75 percent of the area of the CGSA is included; or (3) it can be clearly determined from a visual inspection of the maps that the contours cover at least 75 percent of the CGSA. *See* Public Notice, Report No. CL-304, issued April 26, 1985. None of the three applications involved here satisfied the coverage demonstration requirement by any of the three acceptable methods. Furthermore, since all the Petitioners have sought to reduce the size of their CGSA's after rejection of their applications, and have not argued that they were in compliance, it would appear that none of their applications, in fact, complies with the required minimum 39 dBu contour coverage. The staff determination that the Petitioner's applications were defective was correct.

8. Nor have the petitioners demonstrated the existence of special or extraordinary circumstances[6] necessary to waive the Section 22.918(b) prohibition of amendments prior to lottery in order to reduce the size of their CGSA's to comply with the minimum 39 dBu contour coverage requirement. Round IV cellular applicants were on notice that their applications would be carefully pre-screened "to ensure that deficient applications are not included in the lottery." *Lottery Order, supra*, at 185. The Petitioners' applications fail to comply with the minimum 39 dBu contour coverage requirement and are, thus, deficient. To permit Petitioners to cure their application defects and be included in the

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[6] *See WAIT Radio* v. *FCC*, 418 F. 2d 1153, 1157 (D.C. Cir. 1969); and Digital Transmission Corporation, Mimeo No. 6705, released August 30, 1985.

lottery would adversely affect the lottery selection chances of those applicants which filed acceptable applications for the Colorado Springs and Little Rock MSAs.

9. Based on the above, we conclude that we must deny the waiver requests and reject the tendered amendments as impermissible under Section 22.918(b). We also conclude that the arguments presented have no merit, and that the Petitions for Reconsideration filed by MV, Omni and CTI will be denied.

### *B. Horseshoe Partnership*

10. Horseshoe Partnership (Horseshoe) has filed a Petition for Reconsideration of the return of the non-wireline application that it filed for the Columbia, South Carolina cellular market.[7] Prescreening analysis disclosed that Susan F. Boyd, a General Partner in Horseshoe with a 49 percent ownership interest, was also a General Partner with a 49 percent ownership interest in Bull Street Partnership and Springwood Road Partnership, both of which had also filed non-wireline applications for the Columbia market. The Horseshoe, Bull Street and Springwood Road applications were all returned as unacceptable for filing for violation of Section 22.921 of the Commission's Rules which provides:

> No party may have an ownership interest, direct or indirect, in more than one application for the same MSA market or have a mutually exclusive application for the same non-MSA/non-NECMA area, except that interests of less than 1 percent will not be considered.

11. In its Petition, Horseshoe argues that its application should be reinstated because it is not now in violation of Section 22.921 since the Bull Street and Springwood Road applications have been dismissed by Public Notice, Report No. CL-362, released August 23, 1985. Horseshoe further states that "At no time did any Partner hold an interest in more than one *accepted* application." Finally, Horseshoe argues that the modification of pre-screening policy announced in Public Notice, Report No. CL-304, released April 26, 1985, requires the Commission to employ a "substantially complete" acceptability standard and to accept Horseshoe's application in order to avoid the uneven treatment of applicants condemned by the Court in *Green Country Mobilephone, Inc.* v. *Federal Communications Commission*, 765 F. 2d 235 (D.C. Cir. 1985).

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[7] File No. 34593-CL-P-95-A-84

12. We reject all of Horseshoe's arguments. First, Horseshoe's attempt to rewrite the clear language of Section 22.921 to make its prohibition applicable only to "accepted" applications is unwarranted. In adopting Section 22.921, we characterized the rule as "precluding participation in more than one application per market . . ." *Lottery Order, supra,* at 218. Section 22.921 specifically prohibits any party from having an ownership interest of 1 percent or greater "in more than one application for the same MSA market . . ." Accordingly, we conclude that Horseshoe's application, as filed, violated Section 22.921 and was properly returned as unacceptable for filing.

13. Nor do we believe that changed circumstances (i.e., the return of the Bull Street and Springwood Road applications) justify reconsideration and reinstatement of Horseshoe's application. All three of the applications, as filed, violated the specific multiple ownership prohibition of Section 22.921. They were all properly returned. To credit Horseshoe's argument that we must now accept its application since the multiple ownership violation has been eliminated by the rejection of the other offending applications would nullify the multiple ownership prohibition. Under the interpretation posed by Horseshoe, cellular applicants would be free to attempt to enhance their chances in the lottery by filing multiple applications in which they hold a prohibited ownership interest yet remain safe in the knowledge that if they are caught at least one application would be accepted. Such an interpretation would wreak havoc with the orderly administration of cellular licensing. For these reasons, we conclude that changed circumstances can not be used by cellular applicants to cure a violation of the specific multiple ownership prohibition of Section 22.921.

14. Moreover, we are unpersuaded by Horseshoe's substantial compliance and unequal treatment arguments. It argues, in essence, that the Bureau's *Public Notice,* "Modification of Cellular Round IV Pre-Screening Policy," CL-304, released April 26, 1985, establishes a precedent for acceptance of applications not meeting the filing requirements if they are "substantially complete." That Public Notice did not establish such a policy, however; it merely addressed the situation of widespread confusion in the industry relating to two specific rule requirements. The rule requiring a "demonstration" that the 39 dBu contours cover at least 75% of the CGSA, which had never been the subject of a definitive interpretation, was deemed satisfied by a statement in the application that coverage was at least 75%; the site availability

certification requirement was *not* relaxed, but the Bureau stated that it would entertain petitions for reconsideration in the case of missing certifications because of confusion resulting from a modification in the Form 401 and lack of clarity in certain Public Notices. Horseshoe's situation is substantially different from that of the applicants who were given relief by Public Notice CL-304. Its application clearly and unambiguously violated an explicit rule section. Horseshoe does not allege that this rule section was ambiguous or unclear, or that it was confused by Commission pronouncements on cross-ownership of competing applications. This violation cannot be excused on the grounds of reasonable confusion as to the application rquirements.[8] Based on the above, we conclude that the arguments presented by Horseshoe lack merit, and its Petition for Reconsideration will be denied.

### *C. Mopsy Partnership*

15. By letter dated August 21, 1985, the non-wireline application filed by Mopsy Partnership (Mopsy) for the Reading, Pennsylvania MSA[9] was returned as unacceptable for filing because "The signature on FCC Form 401 does not correspond with the applicant's name and post office, Item 1, as required by Section 22.20(b)(1)." Mopsy argues that its application is filled out completely and signed, and that its application should be reinstated.

16. The original of Mopsy's application, at page 6 of FCC Form 401, indicated that Mopsy Partnership was the applicant and was signed by David R. Patterson as "Partner". The Applicant line on page 6 is followed by the parenthetical "(must correspond with that shown on page 1)." Mopsy's application indicated that completed page 1 of FCC Form 401 appeared in Exhibit 10. However, Item 1 of each of the three completed FCC Form 401 page 1's that appear in Exhibit 10 indicates that the applicant is "Marlow Partnership, 1029 Marlow Rd., Raleigh, NC." Thus, the name of the applicant on the signature page did not correspond with the applicant indicated in Item 1, page 1, as required.

17. Despite the discrepancy in the original of Mopsy's application, we have decided that we should grant reconsideration and reinstate Mopsy's Reading application for several reasons. First, despite the page 1 listing of Marlow Partnership as the applicant, it was clear that the real applicant was Mopsy. Mopsy's name

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[8] Horseshoe's citation of *Green Country, supra*, is inapposite.

[9] File No. 32483-CL-P-118-A-84

appeared on the cover, in the Exhibit 1 ownership information, in the antenna structure notifications, on the bank loan commitment letter and the applicant's financial statement, and the application was signed by a Mopsy Partner. Second, review of the copy of Mopsy's application on file in the cellular public reference room discloses that the completed FCC Form 401 page 1's therein contained list Mopsy Partnership as the applicant. Thus, the defect in the original application was obviously the result of a collation error, and all of the correct information was contained in the reference room copy which was simultaneously filed. Since all of the necessary information was timely filed with the Commission, and no prohibited amendment is necessary, we will grant Mopsy's Petition and reinstate its Reading application.

### *D. Radiotel of America Limited Partnership*

18. Radiotel of America Limited Partnership (Radiotel) filed non-wireline applications in eight Round IV cellular markets. In five of those markets,[10] Radiotel's applications contained copies of a pre-filing agreement that it had entered into with Joyce Cable, Inc. (Joyce) which had also filed non-wireline applications for the same five markets. As pertinent, the pre-filing agreement stated:

> WHEREAS Joyce Cable, Inc. (Joyce) has engaged the services of Metropolitan-Radio Telephone Systems, Inc. (MRTS) for the preparation of cellular mobile radio applications for the 18 markets listed in Attachment A[11] in exchange for consideration and a 30 percent ownership position by MRTS in the applications filed by Joyce; and
>
> WHEREAS the agreement between Joyce and MRTS has been assigned by MRTS to Radiotel of America Limited Partnership (Radiotel) and Radiotel is the successor in interest to MRTS; and . . .
>
> Joyce and Radiotel will file separate cellular applications for the 18 markets listed in Attachment A . . .
>
> Joyce will have at the time of filing 100 percent ownership of its applications and Radiotel will have at the same time 100 percent ownership of its applications. Each party will bear the costs of preparing and filing its own application, Joyce having already paid, or agreed to pay, Radiotel/MRTS full compensation with respect to Joyce's applications, and each party shall thereafter bear the expense of prosecuting its own application until the two applications are merged . . .
>
> Joyce will hold a 70 percent equity and voting interest in the merged applicant. Radiotel will hold a 30 percent equity and voting interest in the merged applicant . . .
>
> If the FCC for any reason disallows any or all of these mergers, or refuses to let the merged applicants compete in the relevant cellular

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[10] Fort Wayne, Indiana; Davenport — Rock Island — Moline, Iowa/Illinois; Des Moines, Iowa; Peoria, Illinois; and Madison, Wisconsin.

[11] Of the 18 markets listed, only the five listed in footnote 10 were in Round IV.

> lotteries, or if it appears likely that the FCC will reach either such decision, Radiotel will dismiss any or all of its affected applications, and Joyce will convey to Radiotel, without further consideration, a 30 percent equity and voting interest in its corresponding application or applications . . .

19. Pre-screening analysis of Radiotel's applications determined that since Radiotel was the successor in interest to MRTS, and since MRTS had prepared Joyce's applications "in exchange for consideration and a 30 percent ownership position by MRTS in the applications filed by Joyce", Radiotel had a 30 percent ownership interest in Joyce's applications. Thus, Radiotel's five applications[12] were returned as unacceptable for filing for violating the multiple application ownership prohibition of Section 22.921 of the Commission's rules.

20. In its Petitions, Radiotel asserts that its applications did not violate Section 22.921. Radiotel states that it "has not conveyed 30 percent interests in its applications, nor does it intend to do so." Radiotel argues that the staff misinterpreted its pre-filing agreement and ignored the "plain language of the pre-filing agreement which states that Joyce and the Petitioner own 100 percent of their own applications." Finally, Radiotel asserts that the Commission has been notified that Joyce and Radiotel have entered into an agreement withdrawing from the pre-filing settlement agreement.

21. As noted above, the original staff determination was based upon the explicit statement in the pre-filing agreement that Radiotel has succeeded to MRTS' 30 percent ownership interests in Joyce's applications. The statement that each applicant owned 100 percent of its applications was not credited because of Radiotel's apparent legal right to a 30 percent ownership interest in Joyce's applications. However, in light of the further explanation provided, we believe that the staff determination was in error. We believe that a careful reading of the pre-filing agreement indicates that although Radiotel did succeed to MRTS' interest, that interest was modified by agreement between Joyce and Radiotel. Rather than presently conveying an ownership interest in exchange for the preparation of its applications, Joyce agreed to pay "Radiotel/MRTS full compensation with respect to Joyce's applications", and to enter the pre-filing agreement with Radiotel. This interpretation supports the statement that each applicant owned 100 percent of its applications, and, we believe, demon-

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[12] File Nos. 30637-CL-P-96-A-84; 30768-CL-P-98-A-84; 30660-CL-P-102-A-84; 30854-CL-P-103-A-84; and 30683-CL-P-113-A-84.

strates that Radiotel's applications do not violate Section 22.921. Accordingly, we will grant Radiotel's Petitions and reinstate its five applications.

## *ORDERING PARAGRAPHS*

22. Accordingly, IT IS ORDERED, that the Petitions for Reconsideration filed by Mopsy Partnership and Radiotel of America Limited Partnership ARE GRANTED, and the six involved applications ARE REINSTATED.

23. IT IS FURTHER ORDERED, that the Petitions for Reconsideration respecting all other applications listed in the Attachment ARE DENIED.

24. A copy of this order will be mailed to the Attorney of Record or to the Contact Representative designated in each of the involved Petitions for Reconsideration.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

## *Attachment*

### APPLICATIONS ASSOCIATED WITH THIS ORDER

| | |
|---|---|
| 1. Cellular Telephones, Inc. | File No. 30334-CL-P-092-A-84 |
| 2. Horseshoe Drive Partnership | File No. 34593-CL-P-095-A-84 |
| 3. MV Cellular, Inc. | File No. 33719-CL-P-117-A-84 |
| 4. Mopsy Partnership | File No. 32483-CL-P-118-A-84 |
| 5. Omni Cellular Telephone Company of Oklahoma City | File No. 33612-CL-P-117-A-84 |
| 6. Radiotel of America LP | File No. 31089-CL-P-096-A-84 |
| 7. Radiotel of America LP | File No. 31085-CL-P-098-A-84 |
| 8. Radiotel of America LP | File No. 31088-CL-P-102-A-84 |
| 9. Radiotel of America LP | File No. 31086-CL-P-103-A-84 |
| 10. Radiotel of America LP | File No. 31084-CL-P-113-A-84 |

**Application, Not Acceptable for Filing**
**Mobile Radio Service, Cellular**
**Review, Application for**
**Rules, Failure to Conform**

> **Application for Review of return of cellular application as unacceptable for filing granted. Application which complied with 39 dBu contour minimum coverage requirement of Section 22.903(a) reinstated.**
> ***—Peoria MSA Limited Partnership***

**FCC 86-45**

## BEFORE THE
# FEDERAL COMMUNICATIONS COMMISSION
**WASHINGTON, D.C. 20554**

| | |
|---|---|
| **In re Application of**<br>**PEORIA MSA LIMITED PARTNERSHIP**<br>**For a Construction Permit to establish a Cellular System Operating on Frequency Block B in the Domestic Public Cellular Radio Telecommunications Service to serve the Peoria, Illinois MSA** | **File No.**<br>**30446-CL-P-103-B-84** |

## ORDER ON REVIEW

**Adopted January 17, 1986; Released January 24, 1986**

**BY THE COMMISSION:**

**1. Peoria MSA Limited Partnership (Peoria) has filed an application seeking review of the action of the Chief, Mobile Services Division, returning Peoria's captioned application as unacceptable for filing. An opposition has been filed by Centel Cellular Company (Centel), to which Peoria has filed a Reply.[1]**

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[1] **On September 13, 1985, Peoria filed an informal letter request for reinstatement of its application, which was opposed by Centel in a letter filed September 26, 1985. These informal pleadings have been superseded by and incorporated into the Application for Review.**

### *Background*

2. By letter dated August 27, 1985, the Mobile Services Division returned the captioned Peoria application as unacceptable for filing. The reason for the Division's action was stated as follows:

> 1) Applicant has failed to submit a statement that the coverage of the combined 39 dBu contours of its proposed cellular system exceeds 75% of the CGSA and 2) it cannot be clearly determined from a visual inspection that the map of the proposed system demonstrates that the 39 dBu contour coverage is at least 75% of the area of the CGSA. *See* Public Notice, "Modification of Cellular Round IV Pre-Screening Policy", Report No. CL-304, released April 26, 1985.

3. In its Application for Review, Peoria asserts that the combined 39 dBu contours of its proposed system actually cover 77.8% of the area of its proposed CGSA so that the underlying objective of Section 22.903(a) of the Commission's rules has, in fact, been satisfied. Peoria characterizes the Bureau's Public Notice CL-304 as establishing new "processing guidelines", and that the return of Peoria's application based upon nonconformance with such previously unannounced guidelines was arbitrary and capricious. Peoria further argues that the guidelines are invalid because they were adopted in violation of the Administrative Procedure Act and were applied retroactively. Finally, Peoria argues that the guidelines unlawfully discriminated between similarly situated applicants without adequate justification.

4. In its Opposition, Centel asserts that the Division's return of Peoria's application was entirely proper. Centel argues that the 75% coverage demonstration requirement of Section 22.903(a) was adopted in a rulemaking proceeding in 1981, so there was no violation of the Administrative Procedure Act and no retroactive application of a new rule. Finally, Centel asserts that the decision in Public Notice CL-304 to deem the demonstration requirement satisfied for applicants who had certified their compliance with the 75% coverage requirement, and the rejection of Peoria's application, which provided no such certification, were entirely justifiable and in no way arbitrary and capricious.

### *Discussion*

5. After careful consideration of the evidence and arguments presented, we conclude that the Division's action returning Peoria's application was arguably correct, based on the information before it. However, the arguments presented by Peoria have

merit, and we will exercise our discretion to grant its Application for Review.

6. At the time Peoria's application was filed, Section 22.903(a) of the Commission's rules provided, in relevant part:

> The CGSA must be drawn on one or more U.S. Geological survey map(s) with a scale of 1:250,000. Within the CGSA the applicant must depict each base station site and its respective 39 dBu contour as determined by the methods described in paragraph (c) below. An applicant *must demonstrate* that the combined 39 dBu contours of all base stations will cover at least 75% of the total CGSA. (Emphasis added).

The wording of this section of the rules had not materially changed from the time it was adopted pursuant to appropriate notice and comment rulemaking procedures in 1981,[2] through the time of Peoria's filing. While additional requirements were added to Section 22.903(a) in 1984,[3] the wording of the quoted section of the rule remained virtually unchanged, and we there stated:

> Of course, we will continue to require each applicant to demonstrate that the combined 39 dBu contours of all base stations will provide coverage of at least 75% of the area of its CGSA, as specified by Section 22.903 of the rules.

*Lottery Order, supra* note 3, at 211–212.

7. In April of 1985, the Mobile Services Division completed its pre-screening of the Round IV cellular applications that had been filed in July of 1984 and began returning applications found to be defective. It was soon brought to the attention of the Division that certain defects noted in a large number of return letters were the result of a widespread misapprehension of the Section 22.903(a) requirement that applicants must demonstrate 75% coverage of the CGSA by the 39 dBu contours. The Division issued Public Notice, Report No. CL–304, "Modification of Cellular Round IV Pre-Screening Policy", on April 26, 1985. The Division there stated:

> Section 22.903(a) requires, in addition to the provision of a map containing a drawing of the 39 dBu contours and CGSA, that "An applicant must *demonstrate* that the combined 39 dBu contours of all base stations will cover at least 75% of the total CGSA" (emphasis added). The staff has considered the "demonstration" requirement as being satisfied if (1) the applicant has included a statement of the area encompassed by the CGSA and composite contours, or (2) it can be clearly determined from a visual inspection of the map that the contours cover at least 75% of the CGSA. A number of applicants merely stated a percentage figure or stated that

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[2] *See Cellular Communications Systems*, 86 F.C.C. 2d 469 (1981).

[3] *See Cellular Lottery Rulemaking*, 98 F.C.C. 2d 175 (1984) (*Lottery Order*).

> their contours covered at least 75% of the CGSA; such applications have, to date, been returned.
>
> It appears that many experienced applicants and consultants operated under the belief that merely stating that the coverage exceeded 75% would satisfy the rule, despite the fact that the rule requires a demonstration rather than a mere certification. While the staff's interpretation of the rule was reasonable, there was thus a widespread contrary interpretation. In view of the fact that the type of showing required by the 75% rule has not been the subject of a definitive published interpretation by the Commission, the staff will set aside letters returning applications solely on this ground and accept the applications for filing if not otherwise defective. It will not return applications for failure to demonstrate 75% coverage in other Round IV markets where the applicant has stated that its coverage exceeds 75%.

8. Peoria's application did not contain either a statement of the area encompassed by the CGSA and composite contours or a specific statement that the 39 dBu coverage exceeds 75% of the CGSA. In addition the Division staff found that a visual inspection of Peoria's map did not clearly indicate that the 39 dBu contours cover at least 75% of the CGSA.[4] Accordingly, by letter dated August 27, 1985, Peoria's application was returned because it failed to satisfy the "demonstration" requirement of Section 22.903(a) under either the original or modified prescreening policies.

9. In its Application for Review, Peoria asserts that its application contained: 1) a map depicting its CGSA and 39 dBu contours; 2) an exhibit demonstrating that the depicted reliable service areas were properly calculated; and 3) "a certification that its application complied with all commission rules." Peoria also asserts that the 39 dBu contours depicted on its map cover 77.8% of the area of the CGSA. Based on the contents of its application, and the fact that its coverage actually exceeds the 75% requirement, Peoria asserts that its application complied with "any reasonable interpretation of the term 'demonstrate' at the time the application was filed."

10. We believe the staff reasonably interpreted the term "demonstrate," as used in the rule, to mean that an applicant must take some affirmative steps, beyond the depiction of contours on a map, to indicate compliance with the 75 percent coverage standard. We recognize, however, that there was no generally accepted interpretation of this requirement in the

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[4] A copy of the map submitted with Peoria's application is reproduced as an Appendix. It is not readily apparent, upon an inspection of the map by the naked eye, that the contours cover at least 75 percent of the CGSA.

industry, as the Common Carrier Bureau also recognized in issuing its Public Notice CL-304.[5] In view of the fact that Peoria's application satisfied the 75 percent standard, which Peoria has verified by examination of the map with a planimeter, we are willing to grant review and accept its application.[6] Peoria was apparently in a similar state of confusion as to the meaning of "demonstrate" as the numerous other applicants given the benefit of the doubt in the Bureau's Public Notice CL-304 and we will afford it similar treatment.[7] In light of our decision, it is unnecessary to address the remainder of Peoria's arguments.

11. Accordingly, IT IS ORDERED, that the Application for Review filed by Peoria MSA Limited Partnership IS GRANTED to the extent indicated, and the captioned application IS REINSTATED and accepted for filing.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

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[5] The Commission had not, prior to the filing of the Round IV applications, issued an order or public notice setting forth its interpretation of the "demonstration" requirement.

[6] We note that Peoria's engineer, in an affidavit, has stated that prior to filing the application he verified that at least 75 percent of the CGSA was covered by the 39 dBu contours, indicating that the applicant was aware of the coverage requirement and conscientiously engineered its application to satisfy it.

[7] In future filings this rule section will no longer give rise to such confusion, as we have recently replaced the "demonstration" requirement with a requirement that applicants explicitly state that they meet the 75 percent rule. *Cellular Lottery Further Reconsideration Order*, CC Docket No. 83-1096, FCC 85-602 at para. 12, released December 3, 1985.

**Misrepresentation**
**Misstatement**
**Site Availability**
**Site Misrepresentation**

**Review Board affirms ALJ's grant of CP in comparative contest for new FM station. Losing applicant was assessed decisive demerits for specifying antenna site without first seeking approval from site owners and for misstating its conversations with site owner. Demerits were tantamount to disqualification because applicant could be licensed only if competing applicant failed.**

**—*Professional Radio, Inc.***
**MM Docket No. 84-63**

FCC 86 R-8

## BEFORE THE

# FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

| | |
|---|---|
| In re Applications of | |
| PROFESSIONAL RADIO, INC.<br>Newberry, South Carolina | MM DOCKET<br>NO. 84-63<br>File No.<br>BPH-820729AK |
| G. Roscoe Bedenbaugh et al. d/b/a<br>SERIVCE RADIO COMPANY Newberry,<br>South Carolina | MM DOCKET<br>NO. 84-66<br>File No.<br>BPH-8303215AC |
| For Construction Permit for a New FM<br>Station | |

*Appearances*

*George R. Borsari, Jr.*, and *Anne Thomas Paxson*, on behalf of Professional Radio, Inc.; and *Lawrence J. Bernard, Jr.*, on behalf of Service Radio Company.

## DECISION

Adopted: February 12, 1986; Released February 24, 1986.

BY THE REVIEW BOARD: MARINO (CHAIRMAN), JACOBS, AND BLUMENTHAL.

BOARD MEMBER JACOBS:

1. This proceeding involves the mutually exclusive applications of Professional Radio, Inc. (Professional) and G. Roscoe Bedenbaugh *et al.* d/b/a Service Radio Company (Service) for authority to construct a new FM broadcast station to operate an Channel 292A (106.3 MHz) at Newberry, South Carolina. By Hearing Designation Order (HDO), 49 Fed. Reg. 5674, published February 14, 1984, the applications were set for hearing on a principal city coverage issue against Service, and on the standard comparative issue.[1] Thereafter, presiding Administrative Law Judge (ALJ) Joseph Stirmer added lack of candor/misrepresentation and transmitter site availability issues against Professional concerning its proposed transmitter site and a related basic qualifying issue against Service to explore whether it engaged in conduct designed to deprive Professional of its site. Memorandum Opinion and Order, FCC 84M-4939, released November 26, 1984.

2. In an Initial Decision (I.D.), FCC 85D-53, released August 16, 1985, the ALJ granted Service's application after concluding that Service was basically qualified and that Professional was either disqualified or deserved sufficiently substantial demerits on the two misrepresentations issues to preclude the grant of its application in the face of another qualified applicant. The principal city coverage and site intervention issues against Service and the transmitter site availability issue against Professional were resolved in favor of the applicants. The ALJ further concluded that under the standard comparative issue, if no consideration were given to the misrepresentation demerits or disqualification, Professional would prevail. This proceeding is now before the Review Board on exceptions filed by Professional and contingent

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[1] Two other applicants, Miller Broadcasting Company, Inc. and J. Stephen McClure d/b/a Newberry Media Company, were also set for hearing by the *HDO*, but their applications were later dismissed pursuant to settlement agreements approved by the presiding Administrative Law Judge. Memorandum Opinion and Order, FCC 84M-3145, released July 17, 1984.

exceptions by Service relating to the misconduct issues specified against both applicants and to the standard comparative conclusions.[2] We have reviewed the I.D. in light of the exceptions and reply briefs, the oral argument held December 6, 1985, and our examination of the record. We adopt the ALJ's finding of fact and conclusions of law, except as modified herein, and conclude that a grant of Service's application would best serve the public interest, convenience, and necessity. Because we agree with the ALJ that Professional "cannot prevail in the face of another qualified applicant," I.D., para. 85, we do not reach the exceptions relating to the standard comparative criteria.

3. *Misrepresentation Issues — Professional.* By Memorandum Opinion and Order, FCC 84M-4939, *supra*, the ALJ added an issue against Professional to determine whether the applicant was lacking in candor or made misrepresentations regarding the availability of the transmitter site it proposed in an April 4, 1983 amendment to its application. The issue was predicated on allegations raised by Service in a motion to enlarge issues filed July 11, 1984 that Professional had not obtained the permission of the landowner before specifying the site. The ALJ also specified an issue based on a second motion to enlarge filed by Service on August 3, 1984, to determine whether Professional and its 60% stockholder, Pauline Davis, misrepresented material facts concerning the availability of the transmitter site in its July 24, 1984 opposition to Service's first motion and in an affidavit from Ms. Davis attached hereto. Specifically, Ms. Davis has stated in her affidavit that the site owner, Howard E. Meetze, "told [her] he would lease his land to whatever party is the winner of the Newberry FM proceeding." However, Service's second motion contained the affidavit of a notary who recorded a statement by Mr. Meetze that he "did not tell anyone that I would lease my land to whatever party is the winner of the Newberry FM proceeding."

4. The ALJ found that Professional did not have reasonable assurance of the availability of the site when it filed its April 4, 1983 amendment specifying the Meetze land as its transmitter site because Ms. Davis had not spoken to Mr. Meetze concerning its availability prior to filing the amendment. I.D., para. 76. Rather, he stated, she had merely proposed the same site as that specified by Service and one of the former applicants, Miller (see

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[2] The parties have not excepted to the ALJ's resolution of the principal city coverage issue against Service or the transmitter site availability issue against Professional, and, therefore, further discussion of these issues is unnecessary.

n. 1, *supra*). *Id.* The ALJ noted correctly that an applicant's specification of a transmitter site carries with it an implied representation that the applicant has obtained reasonable assurance that the site will be available,[3] and declared that Professional's premature site specification in this case would ordinarily warrant disqualification or a severe comparative demerit. *Id.*, paras. 77, 80. He concluded, however, that Professional's misconduct was somewhat mitigated because in specifying the Meetze site, Ms. Davis was acting in accordance with advice received from her engineer, who in turn had obtained said advice from Professional's legal counsel. *Id.*, para. 80. The ALJ therefore assessed only a moderate comparative demerit under the first misrepresentation issue. *Id.* Under the second issue, the ALJ further found that Ms. Davis' July 24, 1984 affidavit misrepresented her conversation with Mr. Meetze, as she readily conceded at hearing. *Id.*, para. 83. This time, however, he did not find her explanations mitigating that the matter was too "confusing" and that she had followed advice of counsel. Instead, he concluded that Ms. Davis' conduct amounted to deliberate misrepresentation, warranting either the denial of the Professional application or the imposition of a serious and substantial demerit permitting the grant of its application only if the Service application was denied. *Id.*, para. 85.

5. In its exceptions, Professional initially contends that it was error for the ALJ to assess it a moderate demerit for failing to obtain Mr. Meetze's site approval prior to amending its application in April 1983. Relying on *George E. Cameron, Jr. Communications*, 71 FCC 2d 460, 45 RR 2d 689 (1979), Professional characterizes the state of the law at the time it filed the amendment as follows: "If a property owner is willing to lease or sell his land to one or more applicants for use as a radio transmitter site, then, absent collusion, there is no reason to suppose that he would deny use of the site to someone else for the same purpose. To do so would simply not be commerically possible." Professional Br. at 21. It argues that the "*Cameron* doctrine" and its progeny[4] were the only guidance available to an applicant in April 1983 and that it relied upon professional legal advice in amending to specify Mr. Meetze's property. Professional

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[3] *See, e.g., South Florida Broadcasting Co., Inc.*, 99 FCC 2d 840, 842, 57 RR 2d 495, 497 (Rev. Bd. 1984); *William F. and Anne K. Wallace*, 49 FCC 2d 1424, 32 RR 2d 105 (Rev. Bd. 1974).

[4] Professional cites *United Broadcasting Co.*, 93 FCC 2d 482, 53 RR 2d 57(1983), as reaffirming *Cameron.*

further maintains that the Meetze site was "unique," because it was non-short spaced and seemingly available for use as a transmitter site, and that the Commission had advised Professional by letter dated March 3, 1983 to amend its application to a non-short-spaced site within thirty days or face dismissal.[5] In light of these exigencies, the fact that the "unique" site had already been specified by two other parties, and counsel's understanding of the law on site specification, Professional states that Ms. Davis authorized the amendment to be filed. Professional also claims that part of the reason that permission had not been obtained prior to filing was the fact that its principals had heard that an effort was being made to prevent the applicant from using the site in an attempt to cause its disqualification, and that Ms. Davis believed that Mr. Meetze had previously denied that he was in fact the site owner.[6] Given all the attendant circumstances, Professional contends that no comparative demerit should have been assessed.

6. To begin with, Professional is in error concerning the state of transmitter site specification law in April 1983. The Commission requires an applicant to have reasonable assurance that its proposed transmitter site is available, and, as noted in paragraph 4, *supra*, has held generally that the specification of a site is an implied representation that such assurance has been obtained. *See William F. and Anne K. Wallace*, *supra*, 49 FCC 2d at 1427, 32 RR 2d at 109. The Commission in *George E. Cameron, Jr. Communications*, *supra*, did not alter this general policy. Rather, it merely addressed a specific potential abuse present in comparative renewal proceedings where an incumbent licensee could possibly bring about the disqualification of an otherwise viable competing applicant by preventing the latter from using the licensee's existing transmitter site. The Commission, therefore, declared that it would render conclusive the presumption that the

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[5] Professional's originally proposed site did not comply with the Commission's mileage separation requirements, and the applicant therefore had requested waiver of the spacing rules. I.D., paras, 41–42.

[6] The claim that Mr. Meetze had denied ownership of the land was predicated on a telephone conversation between Ms. Davis and Mr. Meetze in October 1982. Following the filing of the Miller application, which specified the Meetze site, Ms. Davis attempted to learn who was the owner of the site. *I.D.*, para. 43. She called three individuals, one of whom was Mr. Meetze. He testified that he was called by a woman who asked whether he had sold land to the Miller Broadcasting Company applicant and he replied "no". *Id.*, para. 44. Ms. Davis' memory of the conversation was that she asked, "Is this the place where [the Miller applicant] was going to put up [its] tower" and Mr. Meetze replied "no." *Id.* Both participants agree that the conversation was brief and abrupt. *Id.*, n. 13.

renewal applicant's site would be available to a successful challenger. 71 FCC 2d at 467. Nothing in *Cameron* lends any support to Professional's proposition that applicants for new stations are free to specify the transmitter sites proposed in competing applications simply because the property owner is willing to lease to its competitors. Professional concedes that the Board's opinion in *South Florida Broadcasting Co., Inc., supra,* holds that an applicant's specification of a transmitter site without obtaining the landowner's approval is clearly wrong, but it points out that *South Florida* had not been decided when its amendment was filed. However, this is irrelevant because any ambiguity as to *Cameron's* intent and scope was clearly removed in *New Continental Broadcasting Co.*, 45 RR 2d 1632, 1633 n. 1 (1979), decided more than three years before Professional's amendment was filed (and five years before *South Florida*). In *New Continental*, the Commission noted: "Where a proposed transmitter site does not already contain broadcast equipment, there is no basis for assuming broadcasting to be its most logical use. Hence, a specific showing of availability must be made." *Id.*[7] Thus, contrary to Professional's contention, Commission case precedent as of April 1983 definitely required a showing of availability and does not support removing the sanction imposed by the ALJ on Professional. Similarly, we are not persuaded that the alleged "uniqueness" of the site or Ms. Davis' unsubstantiated belief that others were attempting to prevent her from utilizing it justified Professional's behavior. Whether or not the site was unique,[8] it is clear that the circumstances relied on by Professional were not. Indeed, they were also faced by Service, since former applicant Miller had the initial option on Mr. Meetze's land and had unsuccessfully attempted to convince Mr. Meetze not to allow the other applicants to use his land; despite Miller's efforts. Service's principal, G. Roscoe Bedenbaugh, successfully sought the site owner's identity and approval to use the site. I.D., paras. 46-48.

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[7] As the Board subsequently elaborated in *South Florida*, 99 FCC 2d at 847-48, 57 RR 2d at 501-02:

> To permit subsequent applicants to merely "assume" a right of succession would put a costly premium on being the first to secure a site and would perversely penalize the prudent. In our view, applicants should not be allowed to sit back while a competitor truly secures "reasonable assurance" of a site — often at considerable expense — and then languorously sit on their assumptions.

[8] The I.D. found that Mr. Meetze's land was not unique because there was other land located in the same vicinity owned by individuals other than Mr. Meetze, and Ms. Davis' original search for available land in that area had not been thorough. I.D., n. 19.

We perceive no valid excuse for Professional's failure to also seek out the site owner and attempt to obtain his approval for use of the land.

7. We agree with the ALJ, however, that Professional's behavior subsumed under the first misrepresentation issue should not be held disqualifying. *Compare WADECO, Inc.* v. *FCC*, F. 2d 122 (D.C. Cir. 1980) (reliance on counsel no bar to disqualification where applicant was intimately involved and acquiesced in attorney misconduct), *with Cumberland Broadcasting Corp.* v. *FCC*, 647 F.2d 1341 (D.C. Cir. 1980) (short-term acquiescence in attorney misconduct not disqualifying where applicant sought advice from other counsel and promptly terminated misconduct). Ms. Davis relied on the erroneous legal advice of counsel concerning a technical matter undoubtedly confusing to the general layman: the Commission's presumptions relating to transmitter site availability. See paragraph 6, *supra*. Thus, the situation is more akin to *Cumberland Broadcasting Corp.* v. *FCC*, *supra*, at 1344, where the Court observed that "a lay person might reasonably assume attorneys possess special expertise." The "blunderbuss of disqualification," *WADECO, Inc.* v. *FCC*, *supra*, at 133 (Mikva, J. dissenting) for conduct resulting simply from a mistake of law would be unduly harsh. We conclude, however, that the matter warrants a more severe sanction than the moderate demerit assigned by the ALJ. The ALJ observed that "irregularities and misrepresentations involving sites specified by applicants" are increasing in frequency and "[o]nly by dealing firmly with these irregularities will applicants be dissuaded from engaging in this type of misconduct." I.D., n. 24. We agree.[9] In the instant case, Ms. Davis' engineer expressly cautioned her that she should consult with the site owner to make sure that the site was in fact available, when he relayed her counsel's advice to her. *Id.*, para. 50. Instead, she rejected this suggestion. *Id.* It is difficult to conceive how a responsible applicant intending to dot its "i's" and cross its "t's" would not have followed such obvious and sensible advice. The weight to be accorded Professional's dereliction will be discussed at paragraph 10, *infra*.

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[9] Future problems in this area should be reduced somewhat by the revision of FCC Form 301, effective June 12, 1985, requiring applicants to certify that reasonable assurance has been obtained from property owners that the site will be available. *See FM Application Processing*, 58 RR 2d 776, 788 (1985).

8. Professional also contends that the I.D. erred in failing to consider all relevant factors when concluding under the second issue that Ms. Davis misrepresented material facts in her July 1984 affidavit concerning her conversations with Mr. Meetze. It argues that Ms. Davis' affidavit did not purport to be a direct quotation but instead was merely a summary or characterization of various conversations that she and her counsel had had with Mr. Meetze and others about the site. Professional claims that Ms. Davis had been told by Mr. Meetze that he would talk to her about a lease after a grant was awarded, and maintains that it was therefore clear that her intent was not to mislead the ALJ or the Commission.[10]

9. We disagree with Professional that Ms. Davis' affidavit can be explained away by simply calling it a "characterization" of her conversations with Mr. Meetze and others. The statement itself that Mr. Meetze had told her "he would lease his land to whatever party is the winner of the Newberry FM proceeding" was literally inaccurate, as conceded by Ms. Davis, and, in our view, was significantly misleading, given its use in a pleading specifically designed to defeat a misrepresentation/lack of candor issue concerning the availability of Mr. Meetze's land. Certainly, as the I.D. found (para. 84), there was a motive to misrepresent, since Ms. Davis' statement ran to a decisionally significant matter, namely Professional's basic technical and character qualifications, and the particular choice of words exudes the "repugnant odor of misrepresentation and lack of candor." *Houston Family Television, Ltd.*, 101 FCC 2d 661, 665, 58 RR 2d 1557, 1560 (Rev. Bd. 1985). That the language was crafted on advice of counsel is not mitigating because, as the ALJ observed, "this was not a matter that required legal advice, only a willingness to correctly recite the content" of her conversation with Mr. Meetze. I.D., para. 84. *Compare WADECO, Inc.* v. *FCC, supra, with Cumberland Broadcasting Corp.* v. *FCC, supra.* Furthermore, the fact that Mr. Meetze contacted the principals of Professional about making his land available after his January 8, 1985 deposition, followed by a meeting and a resolution of the site matter, lends support to his testimony, both at the deposition and at hearing, that to the best of his recollection, he had never told

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[10] Subsequent to Mr. Meetze's deposition by Professional on January 8, 1985, Mr. Meetze called Professional's 40% stockholder, Mr. Davis, and said he would talk to the Davises about making his land available. In a meeting on July 11, 1985 between the Davises and Mr. Meetze, the latter agreed to make a good faith attempt to reach an agreement for use of the site. I.D., para. 72.

Ms. Davis or her attorney before the filing of her affidavit that he would talk to Professional about leasing his land — an additional element in undermining Ms. Davis' assertion that she was simply characterizing her conversations with Mr. Meetze. *See* I.D. paras. 59, 61, 71-72. Obviously, some ambiguities and misunderstandings might be expected to result from the conversations between Mr. Meetze and Ms. Davis, due to the understandable objective of Mr. Meetze to protect himself from being dragged into an undesirable binding situation involving his land, and the counter objective of Ms. Davis to adequately demonstrate that Professional had an available and suitable transmitter site. Professional, however, could have avoided this entire inquiry and adverse finding concerning the conversations about the Meetze site simply by being more precise and candid. "Where qualification of a representation is necessary for complete accuracy, it is better to be safe than sorry." *Coastal Bend Family Television, Inc.*, 94 FCC 2d 648, 651-52, 54 RR 2d 367, 270 (Rev. Bd. 1983), quoting from *WHW Enterprises, Inc.*, 89 FCC 2d 799, 808, 51 RR 2d 409, 415 (Rev. Bd. 1982).

10. On this issue, more than with the first misrepresentation issue discussed in paragraphs 5-7, *supra*, Professional's mitigation arguments do not succeed in diminishing the heavy sanction that is appropriately assessed (in essence, a dispositive comparative demerit or disqualification). Viewed together, Professional's behavior under both issues reflects at best "a pattern of significant carelessness and misrepresentation which warrants a significant comparative demerit, even without evidence of an intent to deceive." *Houston Family Television, Ltd., supra*, 101 FCC 2d at 665, 58 RR 2d at 1560. More particularly, its behavior to date bodes ill as an indicant of its propensity for truthfulness in dealing with the Commission, a virtue which lies at the core of our entire regulatory program. *Sea Island Broadcasting Corp.*, 60 FCC 2d 146, 157, 37 RR 2d 1235, 1248 (1976). Professional therefore "warrants, at least, . . . heightened substantial demerit[s] in comparison to [Service]" and "should be licensed only if the other [applicant] fails." *People's Broadcasting Corp.*, 92 FCC 2d 1305, 1319, 52 RR 2d 1617, 1629 (Rev. Bd. 1983). The demerits assessed here are tantamount to disqualification because they are of such magnitude as to eviscerate any entitlement the applicant might otherwise have to a comparative evaluation, but the technically lesser sanction imposed accords with earlier precedent, where, as here, there is a blurred distinction between willful and clumsy lack of candor. *See Houston Family Television, Ltd.*,

*supra*, 101 FCC 2d at 665, 58 RR 2d at 1560; *Coastal Bend Family Television, Inc., supra*, 94 FCC 2d at 659, 54 RR 2d at 374.[11]

11. *Site Issue — Service*. The remaining exception requiring discussion relates to the issue specified against Service to explore the circumstances surrounding its contacts with Mr. Meetze to determine whether it deliberately engaged in conduct designed to undermine the prosecution of Professional's application by depriving the latter of its transmitter site. Memorandum Opinion and Order, FCC 84M-4939, *supra*; I.D., paras. 86-88. Professional contends that a substantial demerit should have been assessed against Service for allegedly misleading the Commission as to the import of the statement obtained from Mr. Meetze that purportedly contradicted Ms. Davis' affidavit and served as the primary basis for the addition of the second misrepresentation issue against Professional (see paragraph 3, *supra*). It argues that Service clearly intended the statement to demonstrate that Ms. Davis' affidavit was untrue, a purpose, Professional claims, not intended by Mr. Meetze, citing Tr. 354, and that Mr. Meetze's statement was artfully drafted to suggest that Service had an

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[11] We acknowledge that the Commission's recent *Report, Order and Policy Statement Regarding Character Qualifications in Broadcast Licensing (Gen. Doc. No. 81-500 and BC Doc. No. 78-108)*, 51 Fed. Reg. 3049 (January 23, 1986) (*Character Qualifications*), may be read to proscribe the assessment of even dispositive comparative demerits against Professional in this proceeding. *See id.* at paras. 110, 113. Nevertheless, we note that the issues here have already been adjudicated and relate directly to the Commission's newly enunciated concerns: "the likelihood that an applicant will deal truthfully with the Commission and comply with the Communications Act and our rules and policies." *Character Qualifications*, para. 7. The Commission's objective in *Character Qualifications*, as set forth in para. 3 thereof, is "to develop a 'clearly articulated licensing policy' which would allow [it] to 'focus on behavior ... truly relevant to broadcast licensing . . .' " and, with respect to comparative proceedings, thereby eliminate unnecessary costs associated with character evaluations which have little bearing on an applicant's ability to act as a responsible broadcaster and which do not lead to disqualification. Where, as here, issues that may lead to disqualification have been designated for hearing, evidence has been adduced, and adverse findings have been made, sanctions other than absolute disqualification would seem to be available. *See*, for example, paragraph 15 of *Character Qualifications*, emphasizing "that a number of remedies are available to us when misconduct does not warrant denial of the application in question." We welcome Commission guidance should our interpretation of *Character Qualifications* be incorrect and comparative demerits be disallowed as a lesser sanction following the adjudication of a basic qualifying issue. In the instant case, however, the result would be the same since, in our view, the distinction here between absolute disqualification and dispositive demerits is *de minimis*, and Professional may be absolutely disqualified on the basis of its misconduct on this record.

exclusive right to the Meetze site, which Professional argues was not the case.

12. We perceive no basis for a comparative demerit against Service. The ALJ found, and we agree, that the evidence fails to establish any wrong doing on the part of Service, or its principal, Mr. Bedenbaugh, in dealing with Mr. Meetze. I.D., para. 88. The ALJ properly concluded that Service merely sought to determine whether Professional had reasonable assurance of the availability of the site specified in its application and then duly provided the Commission with the relevant facts that it had uncovered. Contrary to Professional's contention that Service played an improper role in the preparation of Mr. Meetze's statement, the record establishes that Mr. Meetze solely determined the contents of his statement and refused to entertain suggestions by Mr. Bedenbaugh. *Id.*, paras, 67–68. Moreover, the record evidence reflects that Mr. Bedenbaugh did not seek to elicit inaccurate information or attempt in any way to undermine Professional's efforts to obtain the Meetze site. *Id.*, para. 70. Hence, the I.D. correctly held that no adverse conclusions regarding the Service application were warranted. *Id.*, para. 88.

13. *Final Evaluation.* All exceptions having decisional significance have been considered by the Board. We affirm the I.D.'s determination, on the issue exploring Service's contact with Mr. Meetze, that no adverse conclusions are warranted against Service. We also affirm, as heightened herein, the adverse conclusions on the two transmitter site misrepresentation issues specified against Professional and award it two dispositive comparative demerits that are tantamount to disqualification. Thus, we hold that a grant of Service's application will better serve the public interest, convenience, and necessity.

14. ACCORDINGLY, IT IS ORDERED, That the application of Service Radio Company (File No. BPH–830215AC) for a construction permit to establish a new FM broadcast station at Newberry, South Carolina IS GRANTED and the application of Professional Radio, Inc. (File No. BPH–820729AK) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

JEROLD L. JACOBS, *Member, Review Board*

FCC 85D-53

## BEFORE THE
# FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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| In re Applications of | |
| PROFESSIONAL RADIO, INC.<br>Newberry, South Carolina | MM DOCKET<br>NO. 84-63<br>File No.<br>BPH-820729AK |
| G. Roscoe Bedenbaugh, *et al.*, d/b/a<br>SERVICE RADIO COMPANY<br>Newberry, South Carolina | MM DOCKET<br>NO. 84-66<br>File No.<br>BPH-830215AC |
| For Construction Permit for a New FM Station | |

### *Appearances*

*Leonard S. Joyce*, *Anne Thomas Paxson*, and *George R. Borsari, Jr.* on behalf of Professional Radio, Inc.; *Lawrence J. Bernard, Jr.* on behalf of Service Radio Company; and *Stephen J. Yelverton* on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

## INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH STIRMER

Issued: August 7, 1985; Released: August 16, 1985

### *Preliminary Statement*

1. This proceeding involves the mutually exclusive applications of Professional Radio, Inc. (Professional) and G. Roscoe Bedenbaugh *et al.*, d/b/a Service Radio Company (Service) for authority to construct and operate a new Class A FM broadcast station on Channel 292A (106.3 MHz) at Newberry, South Carolina.[1] In a *Hearing Designation Order (HD)* adopted January

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[1] Miller Broadcasting Company, Inc. (Miller) and J. Stephen McClure, d/b/a

26, 1984, 49 Fed. Reg. 5674 (published February 14, 1984), the following issues as to Professional and Service were specified for comparative hearing:

> (1) To determine whether the proposal of [Service] would provide coverage of the city sought to be served, as required by Section 73.315(a) of the Commission's Rules and, if not, whether circumstances exist which warrant waiver of that Section[.]
>
> * * *
>
> (4) To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> (5) To determine, in the light of the evidence adduced pursuant to the foregoing issue, which of the applications should be granted, if any.

2. Paragraph 13 of the *Hearing Designation Order* provided that because there were significant differences in the size of the areas and populations which would receive service from the applicants, such differences would be considered under the standard comparative issue to determine whether a comparative preference should be assigned to either of the applicants.

3. A hearing was held on the above issues on July 24, 1984. Proposed findings of fact and conclusions of law and reply findings were submitted by the applicants in September and October of 1984. Thereafter, on November 21, 1984, the Presiding Judge issued a *Memorandum Opinion and Order*, FCC 84M-4939, released November 26, 1984, specifying for further hearing the following issues:[2]

> (a) To determine whether Professional was lacking in candor or misrepresented facts or information regarding the availability of the transmitter site proposed in an amendment to its application filed April 14, 1983, and, if so, to determine the effect thereof on the applicant's basic or comparative qualifications.
>
> (b) To determine whether Professional has a reasonable assurance that the transmitter site proposed in its application will be available for construction of its proposed station.

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Newberry Media Company (Newberry) also applied for this allocation, and their applications were initially included in the present proceeding. However, a Joint Request for Approval of Settlement Agreements and for Dismissal of (the Miller and Newberry) Applications was filed on June 18, 1984, and by *Memorandum Opinion and Order* (FCC 84M-3145), released July 17, 1984, the Presiding Judge approved the joint request and dismissed the specified applications.

[2] Alphabetical designations (a) through (d) have been assigned to the special added issues for purposes of reference herein.

(c) To determine whether Professional and its principal, Pauline Davis, misrepresented material facts concerning the availability of its transmitter site in a pleading styled "Opposition to Motion for Enlargement of Issues" and the affidavit attached thereto as Exhibit A filed with the Commission on July 24, 1984.

(d) To determine all the facts and circumstances relating to Service's contacts with the owner of Professional's specified transmitter site; and based on the evidence adduced, the effect on Service's basic and/or comparative qualifications.

4. A second prehearing conference was held on December 4, 1984. Hearing sessions on the added issues were held on February 5 and 6, 1985. The hearing record was then closed on February 6, 1985 except for the limited purpose of receiving into evidence full-scale copies of an oversized map, reduced copies of which had previously been identified and received as a Professional Exhibit.[3] At the conclusion of the second round of hearings, the Presiding Judge instructed the parties to submit, along with their proposed findings of fact on the added issues, consolidated conclusions of law, treating all issues designated for hearing in this proceeding.

5. The applicants submitted supplemental findings of fact and consolidated conclusions of law on April 12, 1985. Reply pleadings were filed by both applicants on May 7, 1985.

## *FINDINGS OF FACT*

### *The Applicants*

### *Professional Radio, Inc.*

6. Professional is a South Carolina corporation, all the stock of which is owned by two principals, Pauline L. Davis (60% interest) and her husband, L. Hayne Davis (40% interest). Mrs. Davis is President, Treasurer, and one of two Directors of Professional. Mr. Davis is Vice-President, Secretary, and the other Director of Professional.

### *Integration*

7. Mrs. Davis is a native of Newberry, South Carolina and a current resident of the proposed community of license. Her present residence address is 2022 Forrest Drive, Newberry, South Carolina (Professional Ex. 2, p. 1; Tr. 63). Mrs. Davis will serve as full-time General Manager of the Newberry FM facility (Professional Ex. 4). She will devote at least forty (40) hours per week to

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[3] The full-scale maps were supplied on February 7, 1985.

management of the station, and will bear primary responsibility for day-to-day station operations; selection and supervision of on-air, sales, and clerical staff; accounting; and community outreach. *Id.* In addition, Mrs. Davis will establish and supervise the implementation of procedures designed to ensure station compliance with all applicable FCC Rules and Regulations. *Id.*

8. Mrs. Davis was born in Newberry on March 1, 1948, and she lived and attended primary and secondary school there.[4] After high school, she attended Winthrop College in Rock Hill, South Carolina, from which she was graduated in 1969 with a B.S. in Physical Education. She attended graduate school at the University of South Carolina in Columbia, South Carolina, and in 1972 received an M.A.T. in Physical Education, with an emphasis in Special Education.

9. From 1969 to 1972, Mrs. Davis was employed full-time as a physical education teacher at Newberry High School. From 1972 to 1974, she was employed full-time at Whitten Center, a state institution for the retarded, where she taught physical education and served as department chairman, supervising one full-time professional staff member and numerous interns. From 1974 to 1975, Mrs. Davis was employed full-time as studio manager at her husband's recording studio, Mother Cleo Productions. In that position she was responsible for secretarial work, office management, accounting, and some sales work, in addition to participating in contracting for talent, leasing recording facilities to musical groups, and radio recording and production.

10. Since returning to Newberry in 1969 after completing undergraduate school, Mrs. Davis' civic involvement has included participation in the following activities: leader of Girl Scouts junior troop (1970–72); leader of Boy Scouts "Special Scouts" troop (1979–present); fundraiser for annual American Cancer Society drives (since 1971); member of the Pool Committee (responsible for hiring lifeguard) of the Newberry Country Club; member of various Newberry College faculty committees (1975–1977), including Faculty Athletic Committee, Student Life Committee, and Physical Education Majors Club (serving as organizer and faculty advisor); fundraiser for Kidney Foundation (1976); Newberry County Coordinator and Area 15 Coordinator for Special Olympics track meets (1980 & 1981), Newberry County Coordinator and co-sponsor of Field Day for special education

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[4] All information concerning Mrs. Davis' educational background, professional experience, and civic activities is derived from Professional Ex. 2, unless otherwise indicated.

students (1982, 1983, & 1984), and trainer of college physical education majors working with Special Olympics participants; member of Newberry High School athletic booster club; member (since 1982) of Preschool Mothers Club II, and held offices as Librarian (1982), Historian (1983), Project Chairman (1984), and Treasurer (elected for 1985); and member of Lutheran Church of the Redeemer, current Sunday School teacher, and past teacher of vacation Bible school.

11. Mr. Davis is a native and current resident of the proposed community of license. His present residence address is 2022 Forrest Drive, Newberry, South Carolina (Professional Ex. 3, p. 1; Tr. 35). Mr. Davis will serve as full-time Technical and Program Director, devoting at least forty (40) hours per week to management of the station (Professional Ex. 4). He will supervise pre-operational station construction and will bear primary responsibility for the day-to-day technical operation of the station once construction is completed. *Id.* In addition, Mr. Davis will be primarily responsible for program acquisition, program production, and station promotion. *Id.*

12. Mr. Davis was born in Newberry February 20, 1948, and he lived and attended public elementary and secondary schools there.[5] He was an undergraduate student at Newberry College, where he completed three years of course work in a business program. He also attended Richland Tech for two quarters in electronics engineering.

13. During all four high school years and for a year after graduation in 1966, Mr. Davis managed, booked, and performed on weekends with a musical group which he had organized. He also performed in a musical group at Newberry College. In 1966, he began working part-time as an announcer at AM station WKDK, Newberry, South Carolina, and in 1967 was given a five-hour daily air shift as a disc jockey at that station. In late 1967, Mr. Davis moved to Monroe, North Carolina, where he was employed full-time to help construct and program a new radio station, WIXE(AM); during that time his job titles were, sequentially, Music Director, Production Director, and Operations Director. While living in Monroe, he also did some free-lance production work in the Charlotte, North Carolina, area as an announcer/audio

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[5] All information concerning Mr. Davis' educational background, broadcast and other professional experience, and civic activities is derived from Professional Ex. 3, unless otherwise indicated.

mixer for WCCB–TV, WRET–TV and Arthur Smith Studios. In spring 1969, he returned to Newberry and worked for WKDK until 1970 when he left due to illness. After recovering some months later, he resumed free-lance production work for WPCC, Clinton, South Carolina.

14. In mid-1970, Mr. Davis devoted full-time (approximately 70 hours per week) to organizing Mother Cleo Productions, began constructing his own studio facility, and continued to write and produce broadcast commercials, jingles, and commercial music programming. In 1971, the Mother Cleo recording studio facilities were expanded to enable full musical productions, and WPCC in Clinton contracted with the production company for a morning personality air shift on which Mr. Davis appeared until 1976. Starting in 1979 and continuing through the present, WKDK in Newberry has contracted with MCP/DaviSound (successor to Mother Cleo Productions) to produce a live show on which Mr. Davis currently appears for three hours per day, four days per week. Mr. Davis testified that he controls the content of the program that he presents on WKDK(Tr. 44); that he does not supervise any other station employees (Tr. 44); that he has no ownership in the corporate licensee of WKDK (Tr. 45); that he has not attended or participated in meetings of the WKDK stockholders, board of directors, or officers (Tr. 58); and that WKDK pays him at the rate of $68.00 per week for the twelve hours of work he performs at that station (Tr. 58). The WKDK contract will be cancelled prior to Professional Radio, Inc.'s commencing construction of the Newberry FM facility.

15. Expansion of MCP/DaviSound facilities has enabled the company to change directions and to focus on custom recording, and on the design and fabrication of custom audio and recording equipment for professional recording studios. Radio production work has largely been phased out. If Professional Radio is awarded the Newberry FM permit, Mr. Davis will discontinue his daily involvement with the management and operation of MCP/DaviSound, turning over the audio engineering function to a present full-time employee of MCP. If necessary, additional part-time employees will be hired to assist with the audio assembly work. (Tr. at 56). Mr. Davis has also made arrangements to turn over the custom recording function to another individual, who will assume full responsibility for the recording sessions. According to Mr. Davis, this will enable him to devote his full-time (at least forty hours per week) to his responsibilities as technical and program director of the FM station. His

participation in the business affairs of MCP/DaviSound will be essentially supervisory, and will, according to Mr. Davis, involve no more than two or three hours per week of his time.

16. Since returning to Newberry in 1969, Mr. Davis' participation in civic activities has included the following: consultation and production work for the Newberry Community Players; master of ceremonies and all production work for Jayceetes Talent Show (1982 Muscular Dystrophy fundraiser); master of ceremonies and provider of amplification equipment for Reuben Elementary and Silverstreet Middle School fundraiser (1983); membership in Lutheran Church of the Redeemer, former Sunday school teacher (1970-1971), and continuing maintenance and repair of church amplification equipment; audio equipment maintenance and emergency repairs for Newberry College; and passive participation (*i. e.*, dues-paying membership) in the Newberry High School athletic booster club, the Newberry Country Club, and, through MCP/DaviSound, in the Newberry County Development Board (1976-77) (Tr. 49-50, 59-60; Professional Ex. 3). Mr. Davis acknowledged that he was not been very active in many of these organizations (Tr. 48-50).

*Diversification*

17. Neither Professional nor its principals have any ownership interest in any media of mass communications (Professional Ex. 5, p. 1).

*Service Radio Company*

18. Service is a general partnership which, for comparative purposes in this proceeding, includes as principals the following individuals: G. Roscoe Bedenbaugh (40% voting rights, one-sixth (16.67%) equity interest); his wife, Peggy C. Bedenbaugh (40% voting rights, one-sixth (16.67%) equity interest); James R. Kelly (10% voting rights, one-third (33.33%) equity interest); and James B. Gowan (10% voting rights, one-third (33.33%) equity interest).[6] (Service Ex. 1; Tr. 134-36). On April 9, 1984, Service amended its ownership proposal to reflect the resignation from the First Partnership of principal James R. Kelly and to report an associated realignment of ownership and voting rights in the applicant. (Tr. 136-37).[7] By *Order*, FCC 84M-2068, issued April

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[6] Referred to as the "First Partnership".

[7] The new partnership, which was formed as a result of changes reported in the April 9, 1984 amendment, shall hereinafter at times be referred to as "Second Partnership".

30, 1984, the Presiding Judge accepted that amendment for reporting purposes only.[8]

*Integration*

19. In the event Service's application is granted, Roscoe Bedenbaugh will become the full-time (at least 40 hours per week) General Manager of the proposed station, Peggy Bedenbaugh will become the full-time (at least 40 hours per week) Program Director of the proposed station, and James B. Gowan will become the full-time (at least 40 hours per week) Business Manager of the proposed new station (Service Ex. 2, pp. 3–4; Service Ex. 3, p. 2; Service Ex. 3, p. 2).

20. Mr. Bedenbaugh, as the full-time General Manager of the new station, will have overall responsibility for the day-to-day operation of the station. He will work at the station a minimum of 40 hours per week. His primary duties will involve advertising sales and promotion of the station in its service area. He will delegate operations of the Program Department to Peggy C. Bedenbaugh, the full-time Program Director, but will consult with her concerning the hiring and supervision of employees in that department and the planning and production of programs to be broadcast by the station. He will also delegate the day-to-day financial operation of the station to James B. Gowan, full-time Business Manager, but will consult with him concerning the station's financial operation on a daily basis. Although Mr. Bedenbaugh will be the person ultimately responsible for hiring, firing and promoting employees, recommendations concerning employment matters will be made in the first instance by Mrs. Bedenbaugh and/or Mr. Gowan when decisions affecting employees under their supervision are being made.

21. Mr. Bedenbaugh's broadcast experience began in 1963 when he went to work at Radio Station WKDK(AM), Newberry, as a full-time Announcer. In 1966 he left WKDK to work at a Clinton, South Carolina station as an Announcer/Salesman for about 18 months. In 1968 he began work at WKMG(AM), Newberry, as Announcer/Salesman and Program Director. The station had begun operation about one week prior to the beginning of his employment. Mr. Bedenbaugh served as an Announcer/Salesman and Program Director for WKMG until about 1971, when he

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[8] At present the partnership interests are as follows: G. Roscoe Bedenbaugh owns and votes a 43% interest in partnership, Peggy C. Bedenbaugh, wife of G. Roscoe Bedenbaugh, owns and votes a 40% interest in the partnership, and James B. Gowan owns and votes a 17% interest in the partnership.

bought a 10% interest in the station and became its General Manager, as well as Chief Engineer. In 1977 he bought additional shares in the station, bringing his total interest to 1/3, and he became an Executive Vice President of the licensee corporation as well as General Manager-Chief Engineer of the station, positions he continues to hold (Service Ex. 2, pp. 1-2).

22. Mr. Bedenbaugh's civic activities have included membership in the Newberry Sertoma Club, a national service organization which promotes cures for hearing and speech disorders in children and supports summer camp programs for needy children. At the time of hearing he was a member of the Board of Directors of the Newberry Chapter, and in the past he served as President and as Chairman of the Board. At the conclusion of his term as President, the national Sertoma Club selected him as an Honor President on the basis of the achievements of the Newberry Chapter during his term as President. He has also been a member of the Association for Greater Newberry and at the time of hearing was serving his second three-year term on the Board of this organization as its Vice President. During an earlier term on the Board, he served as Treasurer of this organization. (*Id.*, at p. 2).

23. Mr. Bedenbaugh has served on the Newberry Chamber of Commerce's Shop Newberry First Committee since 1977 and was on the original Planning Committee for this organization's first annual Newberry County Egg and Dairy Festival in 1983. He has also served terms as the Chairman of the Board and President of the Newberry Unit of the American Cancer Society and is a member of the Board of Directors of the Newberry County Development Board and Chamber of Commerce. He has been a member of the Board of the Newberry County District Boy Scouts of America Committee and of the United Way of the Midlands, the Newberry area's United Way Campaign. While living in Prosperity, he was a member of the Grace Lutheran Church council and served as assistant superintendent of the Sunday school. He also served on the Prosperity Town Planning Commission and the Prosperity American Bicentennial Committee. (*Id.* at pp. 2-3).

24. Peggy C. Bedenbaugh, as previously noted, is a general partner in Service and, as of the applicable B cut-off date, held a 40% voting interest and a 16.67% equity interest in that applicant. If Service's application is granted, Mrs. Bedenbaugh is proposed to become full-time (at least 40 hours per week) Program Director of the FM station. As Program Director, she will select

entertainment programming, supervise the announcers, and be responsible for the production and airing of all the station's news and public service programming.

25. Mrs. Bedenbaugh was born in Newberry, South Carolina in April of 1946 and has maintained her residence in Newberry County ever since. She graduated from Newberry High School and lived in the immediate Newberry area until her marriage to G. Roscoe Bedenbaugh in 1965. From 1965 to 1977 she resided with her husband in Prosperity, South Carolina. Between 1977 and April of 1984 Mrs. Bedenbaugh served as Traffic Director of Station WKMG(AM), Newberry, South Carolina. (Service Ex. 3, p. 1).

26. Mrs. Bedenbaugh's civic activities have included participation in Cub Scouting programs in both Prosperity and Newberry. She was Cub Master of the program when she lived in Prosperity and has served as Den Leader in both Prosperity and Newberry. She has also been President of the Lutheran Church Women's Organization, and a Sunday school teacher in the Church's Vacation Bible School. She has been active in Parent-Teacher's organizations and has served as secretary of the Newberry High School Booster Club for the 1984-1985 school year, and has been a volunteer contact person in raising funds for local chapters of the American Cancer Society, the American Heart Fund and the March of Dimes. (*Id.*, pp. 1-2).

27. According to Mrs. Bedenbaugh, she did not attend the meeting at which the First Partnership was organized, but that "a written partner agreement ... was brought home for [her] to sign" and that she understood at that time that she "just had a voting power" but "didn't have an ownership interest" (Tr. 93). Mrs. Bedenbaugh stated that her being brought in as a 40% voting partner "was just on the advice of counsel" and that "it was in the best interest of the application, maybe, that I be brought in" (Tr. 93-94). After the dissolution of the First Partnership, Mrs. Bedenbaugh became one of three principals in the Second Partnership. She said that her 40% ownership interest in the Second Partnership was also created "on the advice of counsel." that she made no monetary contribution for that interest, and that she does not know whether she is liable for partnership debts under the terms of the latest partnership agreement (Tr. 96-97). While Mrs. Bedenbaugh testified that she has some idea of what her husband's plans are, the selection of the role she could best play at the station "was a joint decision between counsel and ... [the other] partners" (Tr. 112-13). Mrs.

Bedenbaugh was unable to define precisely what her proposed supervisory and production responsibilities might entail because "[y]ou just have to see what the situation calls for whenever the station goes on the air" (Tr. 110-112).

28. James B. Gowan is a general partner in Service and, as of the "B" cut-off date, had a 10% voting interest and a 33.33% equity interest in the applicant (Service Ex. 1; Tr. 134-36). If Service's application is granted, Mr. Gowan is proposed to become the full-time (at least 40 hours per week) Business Manager of the proposed new FM station, with responsibility for the overall day-to-day financial operations of the station. Mr. Gowan received no consideration for reducing his percentage of ownership in the applicant at the time the Second Partnership was formed (Tr. 183), and had understood that his ownership interest in the First Partnership was "a fourth" although he was on record with the FCC as having had a 10% voting interest and 33.33% equity interest in the applicant (*Supra* at para. 23; Tr. 134-36, 173).

29. Mr. Gowan is 70 years old and has resided in the Newberry area for 54 years. At the time of hearing he lived less than a half mile from the Newberry city limits. In 1949 Mr. Gowan opened the Globe Finance Company and presently serves it as a semi-retired President, devoting about four hours a week to its affairs. The company has four offices and some 18 employees. Mr. Gowan is also the Vice President and the owner of 1/3 of the outstanding stock of the licensee of Radio Station WKMG(AM), Newberry, South Carolina, and has been an owner of said station since its inception in 1968. When the station first began operations, he was active in its operation, assisting full-time employees with sales, promotion and other activities. However, he has never been a full or part-time employee of the station (Service Ex. 4, p. 1).

30. Following his retirement, Mr. Gowan sought to return to work at Globe Finance Company. However, by that time his doctors had discovered that he had a problem with his back. He had two discs removed from his back in July 1983 and still suffers some pain. He was advised by his doctor not to make the trip to Washington to testify at the hearing (Tr. 176-77). While Mr. Gowan has not actively sought employment, he said he would welcome the opportunity "to get out of retirement" (Tr. 197-98).

31. Mr. Gowan's civic activities have included service as the President of the Newberry Lion's Club and President of the Newberry College Booster's Club. He has served on a number of fund raising committees at Newberry College and is a Deacon of

the Glenn Street Baptist Church which he has also served as Chairman of the Sunday school division and Chairman of the building committee. Finally, Mr. Gowan has served as trustee of the Connie Maxwell Children's Home in nearby Greenwood, South Carolina and as a Director of the South Carolina Consumer Finance Association. (*Id.*, at pp. 1–2).

*Diversification*

32. Service has no interest in or associations with any existing media of mass communications (Service Ex. 1). However, James R. Kelly, James B. McGowan, and G. Roscoe Bedenbaugh are all officers and directors of Service Radio Company, Inc. licensee of WKMG(AM), Newberry, South Carolina. Each has a one-third ownership interest in that entity, and Mr. Bedenbaugh is full-time General Manager of WKMG. The decision to file an application for a new FM station was based on a desire to improve WKMG's competitive position in the Newberry market where, as a daytimer, it must now compete with full-time station WKDK (Tr. 51, 165). At present WKMG begins operations as early as 6:00 a.m. during only one month of the year. The station has limited pre-sunrise authority which permits it to operate from 15 to 30 minutes before sunrise during some months with power restricted to 50 watts (Tr. 165, 167). Mr. Bedenbaugh believes that better service could be provided to the community with a full-time station.

33. As previously noted, James R. Kelly was a former partner of Service. While Mr. Kelly was still a partner[9] Service filed an amendment to its application which indicated that

> . . . [u]pon grant of the instant application for a construction permit for a new FM station, the partners of this applicant will divest themselves of all interest in Service Radio, Inc. and/or AM Station WKMG prior to the beginning of operation of the new FM station . . . ". (Tr. 158).

The amendment containing the above quoted language was filed with the Commission on July 14, 1983 prior to the "B" cut-off date (Tr. 158–159). The divestiture proposal described in the amendment was agreed to at a meeting among all of the stockholders of the licensee of WKMG, including Mr. Kelly (Tr. 164–165).

34. According to Mr. Bedenbaugh, although he made some overtures to local people within the last two years to see if they

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[9] Kelly held at 10% voting interest and a 33.33% equity interest before he withdrew from the partnership. He withdrew after the "B" cut off date.

were interested in buying the station, he has been unable to find a buyer for WKMG(AM) (Tr. 140-41). He also stated that he has talked to brokers and had an asking price for the station (Tr. 139). He acknowledged that in order to dispose of his one-third interest in WKMG, he would not only have to find a buyer but would have to be replaced as General Manager (Tr. 142). If purchaser for the station is not obtained, Mr. Bedenbaugh believes that he could turn the station over to Mr. Kelly . . . or send the license back to the FCC (Tr. 144). Although Mr. Bedenbaugh would rather not divest, he eventually promised to do so on advice of counsel (Tr. 146, 149). He has not discussed with Mr. Kelly the possibility of Mr. Kelly's assuming his interest in WKMG (Tr. 147-48).

### *Auxiliary Power*

35. Service Radio Company's proposed new FM station will be constructed with auxiliary power generators adequate to provide power to operate the station in the event power from local utilities is not available during emergencies (Service Ex. 1).

### *73.315(a) Issue*

36. Professional and Service propose to operate from the same transmitter site (34° 19′24″ N, 81° 31′02″ W), at the same power (3.0 kw ERP) and essentially the same height above average terrain (300 feet and 295 feet, respectively). (Joint Ex. 1 at para. 1; Service Ex. 5, pp. 1-2). Both parties have agreed, with the concurrence of Bureau counsel, that distributions between their technical proposals, as well as between the areas and populations proposed to be served by the respective applicants are immaterial. (*Id.* at para. 2; Tr. 27). Professional and Service would provide virtually identical signals over the city of Newberry.

37. Service's proposed 3.16 mV/m (FM city-grade) signal does not encompass the entire city of Newberry, its proposed community of license, and Service did not, prior to designation of its application for hearing, request a waiver of Section 73.315(a) of the Commission's Rules.[10] (*HDO* at para. 7). Service requested the necessary waiver at hearing, and submitted an engineering exhibit demonstrating that Service would provide city-grade coverage "to at least 85% of the city [of Newberry, and that the Commission's] mileage separation requirements . . . preclude the location of a

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[10] Professional submitted with its application facts and circumstances demonstrating that a waiver regarding its proposal would be in the public interest. (*HDO* at para. 7).

station on FM Channel 292-A . . . at any site from which greater coverage to the city could be realized." (Service Ex. 5, p. 4).[11]

*Site and Misrepresentation Issues*

38. Much of the evidence adduced at the hearing relates to more than one of the site issues, and the parties did not attempt to segregate the evidence they offered under discrete issues. For these reasons, the findings of fact will be presented in chronological order rather than on an issue by issue basis. Inasmuch as all of the evidence relates to contacts various people had with Howard E. Meetze, the owner of the land on which both Service and Professional propose to locate their transmitters, the chronological findings begin with events in the summer of 1982 when principals of Miller Broadcasting Company, Inc. (Miller), a former applicant whose application was dismissed by *Order* of the Presiding Judge released July 17, 1984, first approached Mr. Meetze about using his land and continue through various contacts representatives of Service and Professional had with him.

39. *The Miller-Meetze Agreement.* In early summer of 1982, two representatives of Miller, "Joe" Miller and "Shotsie" McCutcheon, visited land owned by Howard E. Meetze in Newberry County, South Carolina, and talked to Mr. Meetze's son concerning use of the land for an FM radio transmitter site. Some weeks later, Mr. McCutcheon and Mr. Miller returned and spoke with Mr. Meetze about obtaining an option to lease the land. They told Mr. Meetze they were 80% sure that there would be a change in the law that would permit them to use a different site for their proposed station, but in the meantime they wanted to propose use of his land in an application to the Commission. (Tr. 306-307).

40. Subsequently, Mr. Miller had a lawyer draw up "papers" which Mr. Meetze described as "an inch thick". Mr. Meetze refused to sign the papers, but said he would sign something that wasn't binding if that would help Mr. Miller. (Tr. 307). The papers supplied by Mr. Miller's lawyers proposed a payment of $1,000 per year for 30 years for use of the land, and that price seemed quite high to Mr. Meetze, who expressed this view to Mr. Miller. (Tr. 308, 339). Thereafter, Mr. Meetze had his own lawyer draw up a short (two page) option to lease which the parties executed on July 13, 1980. (Service Ex. 6, p. 5; Professional Ex. 12). The

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[11] Neither Professional nor Bureau counsel objected to the receipt into evidence of Service Exhibit 5. (Tr. at 27-28 and 83-84).

document was basically an accommodation to permit Mr. Miller to file an application with the Commission, but Mr. Meetze agreed to talk with Mr. Miller about leasing the land if Mr. Miller decided he actually wanted to construct his station there (Tr. 308). The document indicated that Mr. Miller had an option for a period of six months to lease two acres of land owned by Mr. Meetze. Consideration for the lease as well as other details were to be negotiated and agreed upon prior to the execution of the lease. (Professional Ex. 12).[12]

41. *Professional's Initial Search for a Transmitter Site*. Independent of Mr. Miller, Professional was also looking for a site during the summer of 1982. Based on his preliminary engineering study, Mr. Simmons, Professional's consulting engineer, had concluded and so advised Mr. and Mrs. Davis that no site existed from which both principal-city coverage of the entire city of Newberry and compliance with FCC mileage separations requirements could be achieved. (Professional Ex. 1, p. 1). Mr. Simmons plotted on a topographical map the 'allowable area' which would comply with the spacing requirements and at the same time afford coverage of the community (*Id.*), and sent a reduced copy of that map (Professional Ex. 9) to Mrs. Davis (Tr. 406). The area he described included the property Mrs. Davis later found to be owned by Mr. Meetze. (Tr. 405–407, 258–260). Mr. Simmons and Mrs. Davis had a number of conversations concerning the location of a suitable site, and Mrs. Davis reviewed Newberry County tax maps in an attempt to locate the owners of land within the area described by Mr. Simmons. (Professional Ex. 7, pp. 1–2; Professional Ex. 8, pp. 1–2). Mrs. Davis contacted some 25 landowners in the area described by Mr. Simmons and was unable to find anyone willing to lease or sell property to her for use as a radio station antenna site. (Tr. 371, 428). Despite the fact that Mr. Meetze's land was located in the area described by Mr. Simmons, Mrs. Davis did not contact Mr. Meetze prior to filing her application (Tr. 377). She was unable to explain how she missed contacting Mr. Meetze during this period of time. (Tr. 371, 374, 424, 377).

42. Because Mrs. Davis was unable to secure a site within the allowable area, upon the advice of Mr. Simmons Professional selected a site outside of the area originally described and filed its application with the Commission on July 29, 1982. The application requested a waiver of the Commission's so-called "spacing"

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[12] Mr. Meetze was of the view that he never agreed to lease his land to anyone, but merely had contracted to talk to Mr. Miller about leasing the land if Mr. Miller got the grant. (Tr. 299, 308).

rules (47 C.F.R. § 73.207(a)) which define the minimum distances FM transmitters must be located from the transmitters of other stations using the same or adjacent frequencies. (Professional Ex. 7, p. 2; Professional Ex. 7, pp. 1-2).

43. *Davis' Contact with Meetze in October 1982.* On September 21, 1982 Mr. Miller filed its application proposing use of Mr. Meetze's land as its transmitter site. Shortly thereafter Mrs. Davis reviewed the Miller application and noticed that the transmitter site proposed therein was in the area which her consulting engineer had designated as the allowable area, but where she had been unable to find a landowner willing to make land available. Although Mrs. Davis really wasn't searching for a new site because Professional's application had already been filed, she was curious about the identity of the person who owned the site proposed in the Miller application. (Tr. 365, 383). She took a description of the land to the Newberry courthouse and asked an employee to help her identify the landowner. She was given three names, one of which was Mr. Meetze. (Tr. 366-367).

44. Mrs. Davis then telephoned Mr. Meetze. (Tr. 366). There is a conflict between the testimony of Mr. Meetze and Mrs. Davis concerning this telephone call.[13] According to Mr. Meetze, a woman called him and asked if he had sold land to Mr. Miller or Mr. McCutcheon, or if they had bought land from him. Mr. Meetze replied: "no", he hadn't sold anything. (Service Ex. 6, p. 8; Tr. 319). The woman did not identify herself to Mr. Meetze and did not give him time to explain himself after answering the direct question she had asked. She merely thanked him and hung up. Mr. Meetze felt like he didn't really know what the woman wanted and that she should have at least identified herself before asking such questions. (Tr. 319-320). According to Mrs. Davis, she asked Mr. Meetze "Is this the place where Mr. McCutcheon was going to put his tower" and that Mr. Meetze answered "no" and hung up the phone. (Tr. 366). Mrs. Davis also called the other two people whose names she had been given and asked them whether they owned the land where Mr. Miller had proposed to erect a tower. Each of them answered "no". She also asked the other two people, but not Mr. Meetze, if they would be willing to lease their land to her for use by a radio station and they replied negatively. (Tr. 367).

45. After making these calls, Mrs. Davis returned to the courthouse and asked another person to help her locate the owner

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[13] Both witnesses agree that it was a brief and abrupt conversation.

of the land on which Mr. Miller proposed to erect its site. After further search, she was given the same three names. (Tr. 366, 382). After obtaining his name a second time, she considered calling Mr. Meetze again, but did not do so (Tr. 382–383). She did not consider going out to see Mr. Meetze (Tr. 383). Mrs. Davis consulted a local lawyer to determine whether the sale or lease of the Meetze land had been recorded by any Miller principal. (Tr. 368). This search revealed nothing. At about this same time, according to Mrs. Davis, she heard rumors from two different sources that the Professional application didn't stand a chance because Mr. Miller had the transmitter site land "all sewed up". (Tr. 369, 296, 368). Based on these rumors, Mrs. Davis was of the view that an effort was being made to prevent her from using the Meetze land which Mr. Miller had specified as its site. (Tr. 370).

46. *Service's 1982 Contacts with Meetze.* In late September of 1982 G. Roscoe Bedenbaugh a principal of Service reviewed the Miller application because he was at that time preparing the Service application and was looking for a suitable transmitter site. (Tr. 460–461). He obtained the geographical coordinates of the site described in the Miller application and went to the County courthouse to determine who owned it. Because he had used the maps in the courthouse previously in trying to locate landowners, he was familiar with the procedure and was able to determine that Mr. Meetze owned the land within about half an hour. (Tr. 461).

47. In early November of 1982 Mr. Bedenbaugh spoke to Mr. Meetze on the telephone. After reviewing their acquaintance, Mr. Bedenbaugh explained that he was planning to apply for an FM radio station in Newberry and wanted to know if Mr. Meetze would make his land available to him for a transmitter site. (Tr. 462). Mr. Meetze replied that he had entered into a six month option to lease the property to Mr. Miller, but at the end of that time he would give Mr. Bedenbaugh the same option if he wanted it.[14] After consulting with other principals in Service, Mr. Bedenbaugh called Mr. Meetze and asked if he could get a written confirmation of the verbal agreement to extend the Miller option to Service. Mr. Meetze replied that he didn't want to put anything in writing, but he again assured Mr. Bedenbaugh that he would be "second in line" if the Miller application was not granted. Mr. Meetze described to Mr. Bedenbaugh the voluminous document prepared by Mr. Miller's lawyers and indicated that

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[14] As previously noted, Mr. Meetze was of the view that he had not agreed to lease his land to Miller, only to talk about leasing the land if Mr. Miller was successful (Tr. 308).

they had proposed to pay him $1,000 per year for 30 years to lease the land. (Tr. 463–464). Mr. Meetze indicted that he felt the proposed rent was generous, and on that basis Mr. Bedenbaugh assumed that figure would be a fair price. (Tr. 464, 517–519).

48. Mr. Meetze and Mr. Bedenbaugh also discussed building an access road to the site and installing power lines, and, according to Mr. Bedenbaugh, Mr. Meetze seemed amenable to working out these details if the Service application was granted. (Tr. 518). Mr. Bedenbaugh was aware that the rental figure of $1,000 per year for two acres of land was far more than the $20 to $30 per acre usually paid to lease farm land in the area. (Tr. 517–518). Mr. Bedenbaugh knew that Mr. Meetze was highly respected in the community, and when he told Mr. Bedenbaugh he would deal with him in the future, Mr. Bedenbaugh had no reason to suspect otherwise. Mr. Meetze said "You have got my word", and Mr. Bedenbaugh felt that he would be able to obtain a satisfactory lease if the Service application were granted. (Tr. 469–470; 481–482; 518). However, Mr. Meetze did not actually agree to lease his land to Mr. Bedenbaugh. (Tr. 330). Thereafter, the Service application proposing use of the Meetze site was filed with the Commission on February 15, 1983. At that time, the six month Miller option had already expired. (Tr. 466; Professional Ex. 12).

49. *Professional's April 4, 1983 Amendment Proposing Use of the Meetze Site.* On March 3, 1983, the Commission sent a letter to Professional's counsel concerning the applicant's request for waiver of the spacing rules. The letter indicated that under Commission policy, spacing waivers would not be granted to applicants in cases where other mutually exclusive applicants had proposed use of a non-shortspaced site. For this reason the Commission ordered Professional to amend to specify a new site within 30 days, or face dismissal of its application. (Professional Ex. 10).

50. Thereafter, Mr. and Mrs. Davis talked several times wih Mr. Simmons, who told them that it now appeared that Professional would have to amend to the allowable area and seek a waiver of the principal-city coverage rule. (Professional Ex. 7, p. 4). Mr. Simmons told Mr. and Mrs. Davis that it was his understanding that if land were available for use as a radio transmitter site by one applicant, . . . it was available to competing applicants for the same use (Professional Ex. 7, p. 4). Mr. Simmons' understanding was based on information he received from George R. Borsari, Jr., one of Proessional's attorneys. (Tr. 266–267). Because two of the

applicants were proposing Mr. Meetze's land for a site, and because it was his understanding that if a site were available to one it was available to all, Mr. Simmons advised the Davises to amend to the same site. However, Mr. Simmons also told the Davises to call the landowner to make sure, but a day later Mrs. Davis reminded Mr. Simmons that the person who she thought owned the site denied that he did when she called earlier. (Professional Ex. 7; Tr. 269–270, 282, 365–367). In addition, Mrs. Davis thought that an effort was being made to prevent her from using the site and had informed both her engineering consultant and her attorney of this (Tr. 385). Mr. Simmons let the matter of Mrs. Davis calling ##denbaugh related this request to Mr. Meetze, who said it wouldn't be necessary to sign anything, that "my word is my bond" and that ought to be sufficient. Mr. Meetze also assured Mr. Bedenbaugh that he hadn't made any commitments to any one other than Miller and Service, but declined to sign a statement to that effect. (Tr. 465–468, 496, 505, 506). Mr. Bedenbaugh had called Mr. Meetze on several occasions before July of 1984, but Mr. Meetze said he didn't believe Mr. Bedenbaugh had ever asked him to refuse to make the land available to any one else (Tr. 322).

51. *The Meetze-Newberry Media Company Contact.* On March 14, 1984, Newberry Media Company (NMC), a former applicant in this proceeding,[15] amended its application to specify the Meetze site. The petition for leave to amend included the following statement:

> In regard to use of the site, NMC has contacted the property owner who has indicated that he will not enter into a written agreement with any of the parties to the proceeding other than Miller Broadcasting Company, Inc. (which obtained an option some time ago) because he had talked to Miller first. However, he indicated that if Miller did not get the grant, he would talk to the successful applicant. Thus, there is reasonable assurance of the availability of the site, particularly since this appears to be a unique site due to the difficulty of locating a site which will meet minimum separation requirements and cover the city of license sufficiently to justify waiver. (Professional Ex. 11, p. 2).

52. Mr. Meetze recalled a short telephone conversation with a person he described as the "Greenville man". According to Mr. Meetze, he told the man about the arrangement with Mr. Miller, and there was no reason why he would not have told him that he was third in line. However, Mr. Meetze felt that the station

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[15] The Newberry Media application was dismissed pursuant to a Settlement Agreement with Professional approved by the Presiding Judge in a *Memorandum Opinion and Order*, FCC 84M-3945, released July 17, 1984.

should be operated by Newberry people (Tr. 302-303).

53. *The Miller and Davis Depositions Taken in May 1984.* In May of 1984, Joe Miller's deposition was taken by Professional. Mrs. Davis learned for the first time during the course of this deposition that the site specified in the Miller application was owned by Mr. Meetze (Tr. 391). Mrs. Davis' deposition was also taken at that time, and Mrs. Davis testified that she had not obtained Mr. Meetze's consent to use his land before the amendment to the Professional application was filed (Tr. 472).

54. *Additional Miller-Meetze Contacts Before the Dismissal of the Miller Application.* Although the precise dates of the conversations are not clear from the record, after Mr. Meetze signed the Miller option, Joe Miller called him three or four times to indicate his desire that Mr. Meetze not give other people permission to use the property as a proposed antenna site. Mr. Miller wanted to obtain an advantage by having exclusive use of the Meetze site. However, Mr. Meetze never agreed to Mr. Miller's request and he didn't let Mr. Miller influence him in his dealings with the other parties (Service Ex. 6, pp. 12, 29-30; Tr. 311-312).

55. *The Miller-Davis Settlement.* On June 13, 1984, Professional and Miller entered into a Settlement Agreement pursuant to which Miller agreed to request dismissal of its application in return for payment of certain sums by Professional (Tr. 396; See FCC 84M-3945, released July 17, 1984). When the Settlement agreement was signed, Mrs. Davis spoke to Mr. Miller about the use of the Meetze land (Tr. 394). She asked Mr. Miller to assign Professional whatever rights to the land he had obtained, but Mr. Miller said that all he had was an option to lease which had expired (Tr. 398). Mr. Miller mentioned that he was going to talk to Mr. Meetze on Professional's behalf. Mrs. Davis' conversation with Mr. Miller was very brief and insignificant in her own mind. She had only one conversation with Mr. Miller, on or about June 13, 1984, concerning use of Mr. Meetze's land (Tr. 394, 438-439).

56. *The July 1984 Miller-Davis-Meetze Telephone Conversations.* On July 11, 1984, Service filed a Motion for Enlargement of Issues requesting, *inter alia*, the addition of an issue to determine whether Professional had made misrepresentations to the Commission concerning the availability of the Meetze land as a transmitter site when it filed its April 4, 1983 amendment. Shortly thereafter, Mr. Miller, Mr. Davis and Mrs. Davis' attorney made separate telephone calls to Mr. Meetze in an attempt to secure

permission for Professional to use his land as an antenna site.[16]

57. Sometime after Mr. Miller agreed to dismiss his application, Mr. Miller had a conversation with Mr. Meetze (Tr. 305). Mr. Miller asked Mr. Meetze to make his property available to all parties in the proceeding so they would all have the same opportunity to acquire the property. Mr. Meetze responded that Mr. Miller "wouldn't have felt that way a couple of weeks ago". Mr. Meetze neither agreed to nor rejected Mr. Miller's request (Tr. 314–315). Mr. Miller did not ask Mr. Meetze to give Professional permission to use the land, only that all the applicants be given the same treatment (Service Ex. 6, p. 94). Mr. Meetze was disturbed to learn that Mr. Miller had dismissed his application in return for payment. He felt that Mr. Miller had taken advantage of his friendship with Mr. Meetze and made money on the option Mr. Meetze had given him (Service Ex. 6, p. 96; Tr. 315). He didn't want his property used to gain an advantage over others (Tr. 315–316).

58. Following his conversation with Mr. Miller, Mr. Meetze received a telephone call from Mrs. Davis. She said she had agreed to pay Mr. Miller to dismiss his application and wanted to use Mr. Meetze's land for a transmitter site in the event her application was granted. According to Mrs. Davis, Mr. Meetze told her that she could talk with him after she got a construction permit (Tr. 441). Further, Mrs. Davis said that her lawyer, Mr. Borsari, also called Mr. Meetze and that Mr. Borsari reported to her that Mr. Meetze had said that he was not going to sign anything, but that if Mrs. Davis got the costruction pemit he would talk with her about putting the tower on his land (Tr. 443). On Mr. Borsari's advice, Mrs Davis made a second call to Mr. Meetze to ask him to sign a statement even though Mr. Meetze had already said he would not sign a statement. (Tr. 448).

59. Mr. Meetze told a number of people that he would not stand in the way of a radio station for Newberry if his land was the only place the tower could go (Tr. 301, 317–318). During their conversations in July, Mr. Meetze had made this statement to Mrs. Davis, but she did not ask Mr. Meetze to explain the statement (Tr. 426, 434, 443, 450–456). During the course of her

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[16] The precise chronology of these calls cannot be determined from the record. According to Mrs. Davis, she made two calls to Mr. Meetze and her attorney made one call over a period of two days, and these calls took place between July 14 and July 17, 1984. (See Tr. 392, 400 and 425). According to Mr. Meetze he received calls from Mr. Miller, Mrs. Davis and Professional's attorney over a very short period of time, and that the calls took place after Mr. Miller had agreed to dismiss his application (Service Ex. 6, pp. 32, 35 and 93).

conversation with Mr. Meetze, Mrs. Davis asked if he would speak to one of Professional's Washington attorneys, George R. Borsari, Jr. (Service Ex. 6, p. 97; Tr. 392). Upon completion of the conversation, Mrs. Davis described it to Mr. Borsari, who then called Mr. Meetze (Tr. 392, 440). Mr. Borsari asked Mr. Meetze the same questions as Mrs. Davis had asked him (Tr. 392–393). Mr. Meetze did not recall telling Mr. Borsari that if the Service application was not granted he would deal with the other applicants in order (Service Ex. 6, pp. 89-90). Mr. Meetze testified that he did not think he told Mr. Borsari that he would talk to Mrs. Davis about leasing the land (Tr. 301). But Mr. Meetze did tell Mr. Borsari that he did not want to stand in the way of Newberry getting an FM station (Tr. 301). Indeed, Mr. Meetze had told a number of people this same thing. He simply meant that he would be willing to discuss the use of his land with whoever won this proceeding so that an FM station could be built in Newberry if the use of his land was the only way it could be done (Tr. 318).

60. During his conversations with Mrs. Davis, Mr. Meetze was upset that Mr. Miller had used the option agreement to make money (Service Ex. 6, p. 31). He "got right mad" a few times during the telephone conversations with Mr. Miller, Mrs. Davis, and Professional's counsel and characterized those discussions as "heated". He was also "quite rude" at some points in the conversations. Mrs. Davis believed that Mr. Meetze was "quite upset" on the day she called him because he felt like he was being manuvered and hassled, and that he was tired of it (Tr. 393, 442). Mr. Meetze said he was thinking about taking out a notice in the local newspaper stating that he would not allow a radio station tower on his land at all (Tr. 441).

61. Mrs. Davis and Mr. Borsari spoke to each other after the Borsari-Meetze call, and Mr. Borsari suggested that she call Mr. Meetze a third time (Tr. 447–448). The following day Mrs. Davis called Mr. Meetze; he told her he didn't like lawyers and doctors, or Washington lawyers either (Tr. 444). According to Mrs. Davis, Mr. Meetze told her again that he would talk to her about a lease if she got the construction permit and discussed certain things that would have to be worked out before a lease could be entered into. The entire conversation lasted about three minutes (Tr. 457–458). Mr. Meetze did not recall the coversation, although he conceded that a third conversation may have taken place (Service Ex. 6, p. 98). However, it was Mr. Meetze's best recollection that he had never told Mrs. Davis that he would talk to her about use

of his land until after his deposition in January of 1985 (Tr. 300).

62. *The Bedenbaugh-Meetze Conversation of July 17, 1984.* Around July 17, 1984; Mr. Bedenbaugh received a telephone call from Mrs. Joe Miller, one of the Miller stockholders, who said that they had settled with Professional and asked why Service had not. Mr. Bedenbaugh responded that he felt that Service had a good chance of winning the case and said that he thought that Professional had a site problem. Mrs. Miller said that someone had been in contact with Mr. Meeze concerning Professional using his property and that she didn't think they had a site problem any more (Tr. 473-474). Mr. Bedenbaugh then requested Shotsie McCutcheon, a Miller principal who worked at the AM station controlled by Service's partners, to call Mr. Meetze to determine what was happening with respect to the site (Tr. 516, 474).

63. Mr. McCutcheon called Mr. Meetze and then reported to Mr. Bedenbaugh that Mrs. Davis and her lawyer had both talked to Mr. Meetze about making his land available to Professional (Tr. 474). He also said that Mr. Meetze was very upset (Tr. 474). Mr. Bedenbaugh testified that he thought Mr. McCutcheon also said that Mr. Meetze stated that Professional was not going to get the site (Tr. 490, 493, 541). However, when Mr. Bedenbaugh asked Mr. Meetze about this statement in a meeting on the following day, Mr. Meetze denied having made it (Tr. 541).

64. Mr. Bedenbaugh wanted to talk with Mr. Meetze in person to discuss use of the land, so he called and asked Mr. Meetze to meet him on the next day (Tr. 477). Before going to the meeting, Mr. Bedenbaugh talked with counsel and they discussed some ideas for a written statement which they wished to obtain from Mr. Meetze. When Mr. Bedenbaugh got to the meeting with Mr. Meetze, Mr. Meetze made it clear he wasn't going to sign anything (Tr. 321, 348, 524-525). It was not Mr. Bedenbaugh's intention to have Mr. Meetze sign a statement indicating that Service would have exclusive use of the site or that Mr. Meetze would not make the site available to anyone else (Tr. 477-478, 531-532, 322-323, Service Ex. 6, pp. 89-90). Mr. Bedenbaugh wanted Mr. Meetze to affirm that he had not made a commitment to Professional (Tr. 478).[17] Mr. Meetze told Mr. Bedenbaugh that he had not agreed to negotiate to make his land available to anyone other than Miller or Service (Tr. 348). Mr. Bedenbaugh, in all his contacts with Mr. Meetze, never once inquired about

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[17] Mr. Meetze did not state specifically that Mrs. Davis did not have a commitment and Mr. Bedenbaugh did not ask Mr. Meetze if Mrs. Davis had a commitment (Tr. 489, 490).

whether Mr. Meetze would or would not talk to Professional about the use of the Meetze property as a transmitter site if Professional was the successfull applicant (Tr. 348, 349, 476–478, 489, 508–509, 512, 520).

65. *Davis' Affidavit of July 24, 1984.* Professional filed an Opposition to the Service Motion for Enlargement of Issues on July 24, 1984. In an attached affidavit, Mrs. Davis stated that after the filing of the April 14, 1983 amendment, she had spoken with Mr. Meetze who "told me he would lease his land to whatever party is the winner of the Newberry FM proceeding" (Service Ex. 7, pp. 3–4). Mrs. Davis was referring to her July 1984 conversations with Mr. Meetze. Mrs. Davis admitted that Mr. Meetze never told her that he would lease his land to the winning party in the proceeding (Tr. 433). She said that Mr. Meetze told her that he would talk to her about using his land, that he didn't want the people of Newberry deprived of an FM station, but that he would not sign a statement. When asked why she chose the language in her affidavit rather than state exactly what Mr. Meetze had told her or something quite similar, she stated: " . . . that is a good question. I guess the reason is because my legal counsel advised that I do it like this because it was already so confusing . . ." (Tr. 433) and that " . . . because I was advised . . . to do it like this" (Tr. 434).

66. *The July 31, 1984 Bedenbaugh-Meetze Meeting.* When Mr. Bedenbaugh read Mrs. Davis' July 24 affidavit he was surprised, because during the conversations he had with Mr. Meetze on July 17, Mr. Meetze had denied making a commitment to Professional (Tr. 479–480). Mr. Bedenbaugh then called Mr. Meetze on July 30th (Tr. 534). He read to Mr. Meetze the statement Mrs. Davis had attributed to him. Mr. Meetze replied that he had never told Mrs. Davis that. Mr. Bedenbaugh then suggested that Mr. Meetze should go on the record to indicate that Mrs. Davis' statement was incorrect (Tr. 480). Mr. Bedenbaugh asked Mr. Meetze to sign a written document refuting the Davis statement, but Mr. Meetze replied that he had told the other people that he wouldn't sign anything and therefore he refused Mr. Bedenbaugh's request (Tr. 483).

67. Mr. Bedenbaugh reported his conversation with Mr. Meetze to his lawyer, who suggested that Mr. Meetze be asked to make an oral statement before a Notary Public (Tr. 484). Mr. Bedenbaugh then called Mr. Meetze and made this suggestion. Mr. Meetze agreed on the stipulation that he would make his own

statement concerning the matter. Mr. Meetze then told Mr. Bedenbaugh what he wished to say in this statement to the Notary and Mr. Bedenbaugh wrote it down (Tr. 323, 328, 335–336, 484, 487; Service Ex. 6, pp. 43, 87). Mr. Meetze made it clear to Mr. Bedenbaugh what he was going to include in this statement and didn't entertain any suggestions Mr. Bedenbaugh tried to make (Tr. 325, 328, 329, 485).

68. Mr. Bedenbaugh made arrangements with a Notary and Mr. McCutcheon, and they went with him to Mr. Meetze's home on July 31. Upon arrival Mr. Meetze said he wanted to talk to Mr. Bedenbaugh and Mr. McCutcheon about the FM proceeding, so Mrs. Meetze and the Notary went off into a separate room for between 20 to 30 minutes while the other three talked. During this time Mr. Meetze reviewed a written statement Mr. Bedenbaugh had prepared on the basis of their earlier telephone conversation and said it contained what he wanted to say (Tr. 486–487). The Notary then came back into the room, Mr. Bedenbaugh asked Mr. Meetze if he had a statement to make, and Mr. Meetze read aloud the written statement. The statement attributed to Mr. Meetze in the document was as follows:

> "I did not tell anyone I would lease my land to whatever party is the winner of the Newberry FM proceeding."
>
> "Since Miller is no longer an applicant, my obligation is to G. Roscoe Bedenbaugh."

69. The next day, Mr. Bedenbaugh prepared a typewritten document containing the statement together with an appropriate description of the Notary's part in the process and sent it to her for execution in her capacity as a Notary. After it was signed by the Notary, Mr. Bedenbaugh sent it to his lawyer along with his own affidavit describing the meeting. He also mailed a copy of the notarized document and his affidavit to Mr. Meetze (Tr. 488, 522).

70. Mr. Meetze was aware that there was an ongoing FCC proceeding concerning the Service and Professional applications and believed that the FCC was going to see the statement he was making (Tr. 355). According to Mr. Meetze, Mr. Bedenbaugh didn't ask for anything that was not accurate, and neither suggested that Mr. Meetze not make the land available to Professional or that Mr. Meetze make a statement to that effect (Service Ex. 6, p. 88; Tr. 349). Mr. Bedenbaugh did not inquire whether Mr. Meetze would talk to the Davises about using his land if they were successful applicant (Tr. 348–349). Mr. Meetze believed that the statement he made before the Notary was

accurate, because on July 31, 1984 only Service had the right to discuss the lease with him if it were the successful applicant (Service Ex. 6, pp. 37–38; Tr. 351). At that time Mr. Meetze had neither agreed to talk to Mrs. Davis, nor denied her permission to talk to him about his land (Tr. 352). The Notary's description of Mr. Meetze's July 31 statement was attached to Service's Reply to Professional's Opposition, and also to Service's Second Motion for Enlargement of Issues, both of which were filed with the Commission on August 3, 1984.

71. *Meetze's Testimony at the January 1985 Deposition.* On November 26, 1984, the Presiding Judge released a *Memorandum Opinion and Order,* FCC 84M-4939, enlarging the issues in this proceeding. Thereafter, on January 8, 1985, Professional took Mr. Meetze's deposition in Newberry, South Carolina (Service Ex. 6, p. 2). During the course of the deposition, Mr. Meetze was asked whether he had told Mrs. Davis he would discuss leasing his land to her in the event the Professional application was granted. He denied doing so (Service Ex. 6, pp. 19, 23). Furthermore, Mr. Meetze was repeatedly asked if, in the event the Professional application was granted, he would discuss entering into a lease with that applicant. In each instance Mr. Meetze refused to answer the hypothetical question (Service Ex. 6, pp. 24, 25, 80, 91, 100 and 101).

72. *The Post-Deposition Davis-Meetze Meeting.* Shortly after the January 8, 1985 deposition, Mr. Meetze telephoned Professional principal Hayne Davis and told him that if Service's application was not granted, he would talk with Professional about making his land available. He also invited both Davises to come to his house so that he could repeat his statement for Mrs. Davis (Tr. 289, 299; Professional Ex. 8, p. 6). The Davises met with Mr. Meetze on January 11, 1985 for about an hour and a half. Mr. Meetze repeated to the Davises that in the event the Service application was not granted he would talk to Mrs. Davis about using his land for a radio station. He explained that he now wanted to answer those questions he had declined to answer at his deposition (Tr. 290). The Davises showed Mr. Meetze a map which showed the exact place where the antenna tower would be located. Mr. Simmons had prepared such a map in July of 1984 (Tr. 359, 258–260). The site depicted on the map was about a quarter of a mile from the place where Mr. Meetze had understood that Mr. Miller wanted to construct the tower. Mr. Meetze had fewer reservations about making available the site described by Mrs. Davis (Tr. 359, 362–363). Although Mr. Meetze said that

a number of matters would have to be worked out before he would enter into a lease with either applicant, he agreed to be reasonable and make a good faith attempt to reach an agreement for use of the site (Tr. 360).

### *Ultimate Findings and Conclusions*

73. This proceeding involves the mutually exclusive applications of Professional Radio, Inc. (Professional) and G. Roscoe Bedenbaugh, *et al.*, d/b/a Service Radio Company (Service) each seeking a construction permit to build a new FM station in Newberry, South Carolina. A number of basic qualifying issues have been specified. Because only basically qualified applicants are entitled to comparative consideration,[18] basic issues will be considered and resolved before the comparative evaluation of the competing applicants will be undertaken.

#### *Section 73.315(a) Issues*

74. The Section 73.315(a) issue specified against Service will be resolved in favor of the applicant. Both Service and Professional are proposing virtually idential signal coverage to Newberry, South Carolina. Because the Commission previously granted a waiver regarding Professional's city coverage, a similar waiver should be extended to Service. In each case, 85% of the city will receive the required signal, and mileage separation requirements would preclude the location of a station on this channel at any site from which greater coverage of Newberry could be achieved. Under these circumstances, a waiver of Section 73.315(a) in favor of Service is warranted.

#### *Site Issues*

75. The added basic qualifying issues are factually interrelated involving generally the transmitter site both applicants intend to use. The first issue is whether Professional was lacking in candor or made misrepresentations regarding the availability of the transmitter site proposed in an amendment to its application filed April 14, 1983, and if so, to determine the effect thereof on the applicant's basic or comparative qualifications.

76. It is clear that when Professional filed its amendment on April 14, 1983, specifying the Meetze land as its transmitter site, it did not have reasonable assurance of the availability of the site.

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[18] *Louis Adelman*, 29 FCC 1223 (1960), *affirmed sub nom. Guinan v. Federal Communications Commission*, 297 F. 2d 782 (1961).

Indeed, not only did Mrs. Davis not talk to the owner of the site prior to filing the amendment, she did not even know who owned the land. She merely specified the same site two other applicants in the proceeding had specified. This was done on the advice she received from her engineer, who obtained such advice from Professional's legal counsel.

77. It has been held that the specificaton of a transmitter site carries with it an implied representation that the applicant has obtained reasonable assurance that the site will be available. *South Florida Broadcasting Co., Inc.*, 57 RR 2d 495, 501–502 (1984); *Retherford Publications, Inc.*, (MM Docket No. 84-841, 842, Mimeo 6366, released September 6, 1984, at para. 10 (MM Bur.); *William F. Wallace*, 49 FCC 2d 424 (1974). Clearly, Professional had no assurance whatever of the availability of its transmitter site. Professional, however, argues that Mrs. Davis acted in good faith in specifying the site and that Professional should not be disqualified or assessed a comparative demerit.

78. It is Professional's position that because the Meetze land was considered unique[19] and because Mrs. Davis believed an effort was being made to prevent Professional from using the land, it was proper for her to follow the advice she received and specify the same site that two other applicants in this proceeding had previously specified. While the specification of the site under the circumstances was clearly wrong the conduct in this instance will not be held to be disqualifying. Mrs. Davis relied on the erroneous legal advice of counsel, and this is a mitigating factor. The belief that a transmitter site available to one applicant is also available to other applicants has specifically been rejected by the Review Board in *South Florida Broadcasting Co., Inc.*, *cited supra*. Moreover, the Commission's holding in *George E. Cameron, Jr., Communications*, 71 FCC 2d 460 (1979], which involved an applicant specifying the facilities of an existing station, does not extend to situations involving applicants for new construction permits. An applicant in this position cannot assume that because a site is available to one, it is available to all. Reasonable

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[19] Mr. Meetze's land was considered unique by Mrs. Davis and her engineer because it was located in a small "allowable area" which would meet spacing requirements and also provide good coverage of Newberry. But others also owned land within this area. While according to Mrs. Davis, she tried to acquire a transmitter site within the "allowable area", her search was apparently not sufficiently thorough to even reveal that Mr. Meetze owned land within such area. Thus, the claim that the Meetze land was unique or the only available land is not persuasive.

assurance as to the site's availability must be obtained before it is specified in an application.

79. Although Mrs. Davis relied upon advice of counsel, that does not totally absolve Professional of all responsibility in the matter. In this connection, Professional's engineer told Mrs. Davis to contact the owner of the land before specifying it as a transmitter site. While she did not learn the identity of the owner in her earlier efforts to ascertain this information, she made no further attempt to contact the owner prior to the filing of the April 14, 1983, amendment. Moreover, if Mrs. Davis believed in good faith that an effort was being made to prevent her from using Mr. Meetze's land (which was not the case), then Professional should have not specified the site in the first place. In any event, it appears that Mrs. Davis was genuinely concerned about what she was doing and asked one of her lawyers specifically how she can specify a site when she did not even know who owned the land. She did not receive an answer to her question. (Tr. 387).

80. Mrs. Davis' failure to contact the site owner before specifying the site, despite her engineer's advice to do so, and her specification of the Meetze land as a transmitter site without having first obtained reasonable assurance that such site was available to Professional warrants the imposition of a moderate comparative demerit. This would ordinarily warrant disqualification or a severe comparative demerit, but because the conduct is somewhat mitigated as a result of the applicant's reliance on the advice of counsel, only a moderate comparative demerit is imposed. However, this conclusion must be considered together with Professional's other conduct discussed under issue (c).

81. An issue was also specified to determine whether Professional's transmitter site is available for construction of its proposed station. This issue is resolved in favor of Professional. Following Mr. Meetze's deposition on January 8, 1985, he advised Mr. and Mrs. Davis that should Professional be the successful applicant in this proceeding, he would be willing to talk to them about leasing the property. While there are a number of matters to be worked out, he would be "glad" to talk to either Service or Professional about a lease, and he would "certainly be reasonable" in attempting to reach an agreement. (Tr. 359-360.) Because he is now aware of the precise location on his land where the antenna tower will be erected, Mr. Meetze is much more amenable to entering into a lease. (Tr. 362-263.) Mr. Meetze had previously indicated that he would be pleased to receive the rental figure of $1,000 per year suggested by Mr. Miller (another applicant who

once had an option on the land) and both applicants have indicated a willingness to pay this amount.

82. Commission policy dictates that a binding legal agreement is not a prequisite to a finding of reasonable assurance of the availability of a transmitter site.[20] In view of the discussion of price and other details which have occurred between the applicant and the landowner, as well as Meetze's testimony that he would be reasonable in negotiating terms, it must be concluded that both applicants have reasonable assurance of obtaining their transmitter sites.

83. Issue (c) seeks to determine whether Professional and Mrs. Davis misrepresented material facts concerning the availability of the transmitter site in an opposition to motion to enlarge issues and in the affidavit of Mrs. Davis attached thereto. Specifically, in response to a petition to enlarge issues questioning the availability of professional's site, Mrs. Davis stated in an affidavit that the site owner "told me he would lease his land to whatever party is the winner of the Newberry FM proceeding." This was not true, as Mrs. Davis readily conceded. Mr. Meetze did not tell Mrs. Davis, or anyone else for that matter, that he would lease his land to the winning applicant. All that Mr. Meetze told Mrs. Davis was that he would not stand in the way of the people of Newberry getting an FM station if the only way they could get it was to have it located on his land.[21] Mrs. Davis did not follow up on this statement or attempt to persuade Mr. Meetze that his land was the only place, but rather merely interpreted Mr. Meetze's remark to mean that he would lease his land to the winning applicant.

84. The failure of Mrs. Davis to correctly state what Mr. Meetze told her is inexcusable.[22] Her explanation that the matter was too "confusing" and that she followed advise of counsel provides no justifiable reason for misrepresenting the conversation with Mr. Meetze. Clearly, this was not a matter that required legal advice, only a willingness to correctly recite the content of the conversation between Mrs. Davis and Mr. Meetze. At the time Mrs. Davis submitted her affidavit, a question had been

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[20] See *High Sierra Broadcasting, Inc.*, 56 RR 2d 1394, 1396–1397 (1984) and cases cited therein.

[21] Even if its assumed that Mr. Meetze told Mrs. Davis and her counsel that he would talk to the winning applicant about a lease, that provided no justification for Mrs. Davis to state unequivocally that Mr. Meetze told her he would lease his land to the winning applicant.

[22] Mrs. Davis could have recited what Meetze told her and then stated her interpretation or understanding.

raised as to the availability of the site specified in her application. In order to convince the Commission that the site was available, Mrs. Davis attributed a statement to Mr. Meetze which he did not make. Mrs. Davis clearly knew that Mr. Meetze did not make the statement attributed to him, but she nevertheless deliberately included the erroneous statement in her affidavit. Thus, not only has Professional specified a transmitter site without reasonable assurance of its availability, it has also deliverately misrepresented what the landowner told Mrs. Davis when the availabilty of the site was questioned in a petition to enlarge issues. Mrs. Davis had a motive to misrepresent what Mr. Meetze told her because she wanted to establish that the site was available to Professional and thereby defeat the petition to enlarge issues. Professional at the time had no reasonable assurance of the availability of the site. Indeed, Mr. Meetze refused to state that the site was available to Professional as late as January 1985 when his deposition was taken. It was only thereafter that Mr. Meetze advised Mr. and Mrs. Davis that he would talk to them about leasing his land if Professional was the successful applicant.[23]

85. Issue (c) is resolved against Professional. The conduct engaged in by Professional amounts to deliberate misrepresentation and warrants either the denial of the Professional application or the imposition of a serious and substantial comparative demerit permitting the grant of the Professional application only if the other applicant fails. *Valley FM Radio*, 57 RR 2d 420 (1984) (Rev. Bd. 1984); *Broadcast Associates of Colorado*, FCC 85R-25, released March 19, 1985. When added to the moderate comparative demerit imposed earlier, it is clear that the Professional applicant cannot prevail inthe face of another qualified applicant.[24]

86. An issue was also designated to explore the conduct of Service relating to the transmitter site specified by both Professional and Service. The primary purpose of designating this issue was to determine whether principals of Service, notably Mr.

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[23] The fact that Mr. Meetze has now agreed to talk to Professional about leasing his land does not excuse Professional from misrepresenting the facts in responding to the petition to enlarge issues. At the time Professional responded to the petition to enlarge issues, Professional had no reasonable assurance of using the Meetze site, but nevertheless falsely represented that Mr. Meetze had stated that he would lease his land to the winning applicant.

[24] Irregularities and misrepresentations involving sites specified by applicants are becoming a subject matter of increasing frequency in Commission proceedings. Only be dealing firmly with these irregularities will applicants be dissuaded from engaging in this type of misconduct.

Bendenbaugh, was responsible for the difficulties Professional encountered in attempting to secure Mr. Meetze's land as its transmitter site. Stated another way, did Mr. Bedenbaugh deliberately engage in conduct designed to undermine the prosecution of the Professional application by depriving that applicant of its specified transmitter site.[25]

87. At the outset, it must be stated that Service had a legitimate interest in investigating the qualifications of its adversary, including the availability of its specified transmitter site. However, in pursuing such investigation, Service was required to adhere to proper conduct and not deliberately engage in activities designed to undermine the prosecution of its opponent's application. See *WIOO, Inc.*, 34 RR 2d 1093 (1975).

88. The evidence fails to establish that Service or Mr. Bedenbaugh engaged in improper conduct in dealing with Mr. Meetze. The purpose of the contacts with Mr. Meetze was to ascertain whether Professional had reasonable assurance of the availability of the site specified in its application.[26] Service had made an arrangement with Mr. Meetze whereby a lease of the land would be discussed if Service was successful in getting the construction permit.[27] In his contacts with Mr. Meetze, Mr. Bedenbaugh learned that Mr. Meetze had no arrangement or understanding with Professional or Mr. and Mrs. Davis for discussing alease of his land. Service merely provided the Commission with the facts learned from Mr. Meetze which contradicted the information supplied by Professional. Mr. Meetze was consistent and adamant in telling Mr. Bedenbaugh that he had no arrangement with Professional and Service was simply relying on such information. More importantly, the information submitted by Service was correct because Professional had no assurance of the availability of the Meetze land for use as a transmitter site until sometime after Mr. Meetze gave his deposition. Under the

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[25] This issue was specified on the Presiding Judge's own motion (see *Memorandum Opinion and Order*, FCC 84M-4939 released November 26, 1984).

[26] Professional faults Mr. Bedenbaugh for not asking Mr. Meetze whether he would discuss a lease with Professional if it was the successful applicant. However, Meetze repeatedly told Mr. Bedenbaugh that he had no arrangement whatever with Professional. Under these circumstances, Mr. Bedenbaugh cannot be faulted for not asking Mr. Meetze whether he would in the future discuss a lease with Professional. It is incumbent on an applicant to obtain reasonable assurance of the availability of its site before such site is specified in an application. Here, Professional had no such assurance until after Mr. Meetze gave his deposition in January 1985.

[27] The discussion included, *inter alia*, a rental fee which appeared to Mr. Meetze to be generous as well as the constuction of an access road.

circumstances, Mr. Bedenbaugh and Service cannot be seriously faulted in this matter. Professional's site problems (including its representations relating thereto) resulted from its own wrongdoing, not from any wrongful conduct on the part of Service or Mr. Bedenbaugh. Thus, no adverse conclusions regarding the Service application are warranted.[28]

89. It has been concluded that Professional is either disqualified or assessed a substantial comparative demerit sufficient to warrant denial of its application in the face of an otherwise qualified applicant. Thus, the comparative issue need not be reached. However, in the event the comparative issue is deemed material, the following conclusions govern resolution of such issue.

### *Comparative Evaluation*

90. On a strictly comparative basis, and without regard to the comparative demerits resulting from the added issues, Professional must be preferred on both important comparative criteria. With respect to diversification, neither Professional nor its principals have any other media interests. This is not the case with respect to the Service application. Specifically, for comparative purposes, Service must be evaluated as if James Kelly has the 10% voting interest which he had on the "B" cut-off date. Because Mr. Kelly is an officer and director and has a one-third interest in Service Radio Company, Inc., the licensee of WKMG(AM), an existing daytime only station in Newberry South Carolina, that important media interest in the community being applied for weighs heavily against Service in the comparative evaluation.[29] While Mr. Kelly is charged with only a 10% interest in Service, his one-third interest in WKMG warrants awarding Professional a comparative preference under the diversification

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[28] Service can be criticized for not bringing the unavailability of Professional's site to the Commission's attention at an earlier date. In this connection, Service learned that Professional had no reasonable assurnce of the availabilty of this land in February 1984, but did not file a petition to enlarge issues until July 1984. Mr. Meetze refused to sign a statement, and this may explain why no petition was filed at an earlier date. Nevertheless, the procedure followed to secure the oral statement from Mr. Meetze (see Paragraph 70 of Findings) could have been used at an earlier date. However, the delay in filing does not sufficiently impact on the basic or comparative qualifications of Service to be of any decisional significance in this case in view of Professional's serious misconduct.

[29] *See Commission's 1965 Policy Statement on Comparative Broadcast Hearings*, FCC 2d 393, 394 (1965).

criteria.[30] Although Mr. Bedenbaugh and Mr. Gowan also each have a one-third interest in Service Radio Company, Inc., they both agreed to divest themselves of this interest prior to the "B" cut-off date and such interest will not be held against them for comparative purposes.[31]

91. Professional must also be preferred on the criteria of best practicable service, i.e., integration of ownership into management. In this connection, Professional will receive 100% integration credit for its proposal to integrate both Mr. and Mrs. Davis full-time into the management of the station. While Service argues that Mr. Davis' integration should not be credited because of his other business commitments, these arguments are based on speculation and lack factual support. Mr. Davis has reconciled how he intends to fulfill his full-time commitment to the proposed station in light of his other business interests, and there is no reasonable basis for not awarding full-time integration credit to Mr. Davis. *Central Texas Broadcasting Co., Ltd.*, 90 FCC 2d 583 (1982). The integration proposal of Mr. and Mrs. Davis is enhanced because both are long-time residents of Newberry, South Carolina. Mr. Davis (40% owner) has broadcast experience, both have been involved in local organizations, and Mrs. Davis, a 60% owner, is a female.

92. Service will receive credit for 90% integration as follows: Mr. Bedenbaugh 40%; Mrs. Bedenbaugh 40%; and James B. Gowan 10%. Mr. Bedenbaugh's 40% integration is enhanced by his extensive broadcast experience, his local residence and his participation in several local organizations. Service is also entitled to credit for its auxiliary power proposal.

93. Professional argues that Mrs. Bendenbaugh's 40% integration proposal should not be credited because she was added to the application "on advice of counsel;" that she played no significant role in the partnership; that she made no monetary contribution for her interest; and that she was not able to define with precision what her supervisory and production responsibilities would entail. Mrs. Bedenbaugh is proposed as the full-time Program Director of

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[30] Because Mr. Kelly neither has a controlling interest in Service or Service Radio Company, Inc., the preference in favor of Professional is significant, but not overwhelming.

[31] While Kelly was still a partner in Service, he agreed to divest himself of his interest in Service Radio Company, Inc. Because Mr. Kelly is no longer a partner in the applicant, he is no longer bound by his prior divestiture commitment. Specifically, the wording of the divestiture statement is such that only the "partners of this application" have agreed to divest. Because Mr. Kelly is no longer a partner or party to the application, he is no longer bound by that commitment to divest.

the proposed station, and Professional has produced no evidence that she would not effectuate her commitment. The factors and arguments relied upon by Professional to deny Service credit for Mrs. Bedenbaugh's integration proposal are speculative in nature, and they do not undermine the unequivocal promise of Mrs. Bendebaugh to serve full-time in a management role at the station.[32] Such integration is enhanced because Mrs. Bedenbaugh is a female, has past broadcast experience, and is a local resident who has been involved in various local organizations.

94. Professional also attacks the integration proposal of Mr. Gowan, who is proposed as the full-time Business Manager of the station. It is argued that because Mr. Gowan is 70 years old and has a back problem his integration commitment will not be effectuated. Professional's arguments lack factual support and they are rejected. A similar proposal was credited in *Vacationland Broadcasting, Inc.*, 55 RR 2d 1299, 1303–05 and Service will here be credited with Mr. Gowan's integration commitment. This integration is enhanced because Mr. Gowan's long-time local residence, and participation in Newberry clubs.

95. In summary, Professional has 100% integration credit compared to Service's 90% integration credit. The enhancement factors are about equal and do not significantly favor one applicant over the other.[33] Thus, Professional's 100% integration is preferred slightly to Service's 90%. Also, on the diversification criteria, Professional is similarly preferred. Therefore, strictly on the comparative issue, Professional would be the preferred applicant.

96. However, as previously noted, Professional must either be disqualified or assessed a substantial comparative demerit which would prevent grant of its application if another qualified applicant is available. Thus, the public interest would best be served by the grant of Service's application and the denial of the Professional application.

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[32] Mrs. Bedenbaugh was added to the applicant to improve its comparative position and she was not very knowledgeable regarding partnership matters. But this does not mean she will not be integrated full-time.

[33] The principals of each applicant are local residents. While Mr. Bedenbaugh has superior past broadcast experience, such experience is held to be of minor significance in the *Policy Statement*. Service has 40% female integration whereas Professional has 60%. Considering all enhancement factors, the applicants are about equal. In any event, whatever enhancement factors favor Service, they are not sufficient to override the fact that Professional has 10% more integration and no media interests.

Accordingly, IT IS ORDERED that the "Petition for Acceptance of Late-Filed Pleading" filed by Professional on October 5, 1984 IS GRANTED and its reply pleading, filed one day late, IS ACCEPTED;

IT IS FURTHER ORDERED that unless an appeal from this Initial Decision is taken by a party or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the Rules, the application of Service Radio Company for a construction permit for a new FM station in Newberry, South Carolina, IS GRANTED and the competing application of Professional Radio, Inc. IS DENIED.[34]

IT IS FURTHER ORDERED that the construction permit shall contain a condition that program tests will not be authorized until the principals of Service Radio Company divest themselves of all interest in, and sever all connections with, Radio Station WKMG(AM) in Newberry, South Carolina.

FEDERAL COMMUNICATIONS COMMISSION
JOSEPH STIRMER, *Administrative Law Judge*

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[34] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall be come effective 50 days after its public release pursuant to Section 1.276(d).

Comparative Criteria

**Applicant with local residence credit prevails over one with broadcast experience advantage. Female credit not assigned because not decisional in the circumstances and because of confusion as to whether Commission still supports this credit.**
—*Talleyrand Broadcasting*
MM Docket No. 84-98

FCC 85R-97

## BEFORE THE
## FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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| In re Applications | |
| Walter D. Barker and Kay F. Barker,<br>d/b/a TALLEYRAND BROADCASTING<br>Bellefonte, Pennsylvania | MM DOCKET<br>NO. 84-98<br>File No.<br>BPH-821012AI |
| BALD EAGLE MEDIA, INC. Bellefonte, Pennsylvania | MM DOCKET<br>NO. 84-100<br>File No.<br>BPH-830214AF |
| For Construction Permit for a New FM Station | |

*Appearances*

*Jeffrey D. Southmayd* on behalf of Talleyrand Broadcasting and *Lawrence Bernstein* on behalf Bald Eagle Media, Inc.

### DECISION

Adopted: November 22, 1985; Released: November 29, 1985

BY THE REVIEW BOARD: MARINO (CHAIRMAN), JACOBS, AND BLUMENTHAL.

BOARD MEMBER BLUMENTHAL:

1. This proceeding involves the mutally exclusive applications

of Walter D. Barker and Kay F. Barker, d/b/a Talleyrand Broadcasting (Talleyrand) and Bald Eagle Media, Inc. (Bald Eagle) for authority to construct a new FM broadcast station at Bellefonte, Pennsylvania. By *Hearing Designation Order*, 49 Fed. Reg. 05674, published February 14, 1984, the applications were designated for hearing on air hazard issues against both applicants, which were subsequently resolved in their favor by summary decisions,[1] and on the standard comparative issue. In an Initial Decision (*I.D.*), FCC 85D-37, released May 30, 1985, Administrative Law Judge Byron E. Harrison (ALJ) found that the applicants were virtually equal under integration of ownership and management but that a demerit for diversification of control should be assigned to Talleyrand; he concluded therefore that Bald Eagle's application would be preferred.

2. The proceeding is now before the Review Board on exceptions by Talleyrand and limited exceptions by Bald Eagle. We have reviewed the *I.D.* in light of the exceptions and reply briefs, the oral argument held October 4, 1984, and our examination of the record. We adopt the ALJ's findings of fact and conclusions of law, except as modified herein, but disagree with his ultimate conclusion that Bald Eagle is the superior applicant. Instead, we hold that a grant of Talleyrand's application will better serve the public interest.

3. *Diversification of Control.* The ALJ found that the only attributable media interest of either applicant was that of Talleyrand's 51% owner, Walter D. Barker, who is presently chief engineer at WTLR-FM, a non-commercial station located at State College, Pennsylvania, which community is adjacent to Bellefonte. The ALJ found that despite Barker's official title at WTLR-FM, he testified that he had significant managerial responsibilities at that station. *I.D.*, paras. 14, 36. Based on Barker's role, the ALJ assigned a demerit to Talleyrand which he ultimately concluded was the only decisional difference between the applicants under the comparative issue. *I.D.*, para. 47. Talleyrand excepts to the assessment of any diversification demerit against it and argues instead that Bald Eagle should be given a demerit because its 100% stockholder, Dolores Nolan, is currently membership director of WVIA-TV and WVIA-FM, Pittston, Pennsylvania. Br. at 4-12, 17-18.

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[1] *See Orders*, FCC 84M-2409, released May 23, 1984, and FCC 84M-3202, released July 20, 1984.

4. We believe neither applicant should receive a diversification demerit. First, with regard to the role of Talleyrand's Mr. Barker at Station WTLR-FM, we do not find that there exists any meaningful impact on the Commission's diversification objectives.[2] In two recent cases, we assessed only very slight demerits against applicants whose principals held the significant managerial position of general manager at two in-state broadcast stations. *See Northland Communications*, 100 FCC 2d 914, 919 (Rev. Bd. 1985); and *Reginald A. Fessenden Educational Fund, Inc.*, 100 FCC 2d 440, 445-6 (Rev. Bd. 1985). Here, the purported diversification impact is even less than in the cited cases because Barker is employed at only a single station; and whatever significance is attached to Barker's managerial duties as chief engineer, these duties have little effect on our cardinal concern for a diversity of media *voices*. Furthermore, unlike the situation in the cited cases, WTLR-FM is a non-commercial station and we have held that such stations, albeit cognizable media interests under Commission policy, have a somewhat lesser diversification importance than commercial stations as a general rule. *See San Joaquin Television Improvement Corp.*, 55 RR 2d 1186, 1188-89 (Rev. Bd. 1984), denying reconsideration of 96 FCC 2d 594, *supra* n. 2. In view of these circumstances, we will eliminate the demerit assigned to Talleyrand by the ALJ.[3] Finally, as for the role of

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[2] We reject Talleyrand's contention, however, that Mr. Barker made a timely commitment to terminate his relationship with Station WTLR-FM. Br. at 10. As the ALJ correctly found, despite Mr. Barker's attempts at various times during the proceeding to clarify his intentions, no commitment to sever his interest in the station was made prior to the "B" cut-off date. *I.D.*, para. 36. His efforts were therefore legally insufficient. *See San Joaquin Television Improvement Corp.*, 96 FCC 2d 594, 596 n. 4 (Rev. Bd. 1983).

[3] In its limited exceptions, Bald Eagle excepts to the ALJ's refusal to grant its July 16, 1984 petition to add a cross-interest issue against Talleyrand based on Mr. Barker's lease of Station WTLR-FM's sub-carrier frequency to provide background music to area businesses. *See Order*, FCC 85M-1012, released March 12, 1985 (memorializing ruling made at the March 8, 1985 conference). We agree with the ALJ that no potential for impairment of arms-length competition, which is the basis for the cross-interest policy, *see Guy S. Erway*, 48 RR 2d 829 (Rev. Bd. 1980), exists because Mr. Barker will terminate his sub-carrier lease upon grant of Talleyrand's application. *See* Talleyrand Exh. 1, p. 5; Opposition to Petition to Enlarge, filed July 31, 1984, Exhs. A, B. Furthermore, Bald Eagle has cited no case where the provision of background music has held to create the kind of meaningful relationship necessary to trigger the cross-interest policy. In fact, we have held that a background music distribution business has no bearing upon the diversification aspect of the comparative issue. *Midwest Broadcasting Co.*, 70 FCC 2d 1489, 1498-99 (Rev. Bd. 1979), *rev. denied*, FCC 79-397, released June 21, 1979. The exception is denied.

Bald Eagle's Ms. Nolan at Stations WVIA-TV and WVIA-FM, the record establishes that she is responsible for acquiring and retaining members for two publicly supported broadcast facilities. Bald Eagle Exh. 2, p. 2. These duties hardly qualify as constituting a significant managerial position for diversification purposes; therefore, Bald Eagle will receive no demerit. *See Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 394 n. 5, 395 (1965); *cf. Minority Broadcasters of East St. Louis, Inc.*, 99 FCC 2d 264, 267 (Rev. Bd. 1984).

5. *Integration of Ownership and Management*. The ALJ credited both Bald Eagle and Talleyrand with 100% full-time integration. Bald Eagle is a corporation whose 100% stockholder is Dolores C. Nolan. Ms. Nolan intends to serve as station manager and work at least 40 hours per week in that capacity. If her application is granted, she intends to relocate her residence to within the proposed service area. Ms. Nolan has had broadcast experience dating from 1977. *I.D.*, paras. 24, 29–34. Talleyrand is a partnership owned by Walter D. Barker, 51%, and his wife, Kay F. Barker, 49%. Mr. Barker proposes to work a minimum of 40 hours per week as the station's general manager. He resides in State College, Pennsylvania and has been a resident of the proposed station's service area since 1959.[4] Mr. Barker has had broadcast experience since 1967 and has been involved in local civic activities. *I.D.*, paras. 10, 12–14, 18, 20. Mrs. Barker plans to be employed a minimum of 40 hours per week as the station's sales manager. She has resided in State College since 1967 and lived within the proposed 1 mV/m service area of the station since 1953. She also has participated in community activities. *I.D.*, paras. 16–17, 19, 21–22. The ALJ concluded that the applicants were approximately equal under both quantitative and qualitative integration with Bald Eagle preferable on female participation and broadcast experience whereas Talleyrand was superior on local residence and civic participation. *I.D.*, paras. 46–47. Talleyrand excepts to the ALJ's failure to award it more significant credit for both local residence and civic participation. It also contends that Dolores Nolan should not have been granted any integration credit because Jimmie C. George, a Bald Eagle director and officer, will actually control the station. Br. at 12–16, 18–22.

6. We hold that Talleyrand should be preferred on the basis of its qualitative enhancement strengths. First, we agree with

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[4] State College is located within Talleyrand's proposed 3.16 mV/m contour and the State College-Bellefonte area constitutes a single broadcast market. *I.D.*, para. 12.

Talleyrand that it is entitled to substantial enhancement credit under the factor of local residence. Local residence is a fundamental consideration in our comparative licensing law because "[p]articipation in station affairs . . . by a local resident indicates a likelihood of continuing knowledge of changing local interests and needs." *Policy Statement, supra,* 1 FCC 2d at 395; *see Waters Broadcasting Corp.*, 91 FCC 2d 1260 (1982); *Radio Jonesboro, Inc.*, 100 FCC 2d 941, 945 (1985). The Commission considers residence of several years' duration more important than proposed future residence. *Policy Statement*, *supra*, 1 FCC 2d at 396. Here, both of Talleyrand's principals are long-term local residents, with Mrs. Barker having lived in the service area since 1953 and Mr. Barker since 1959. In stark contrast, Ms. Nolan, Bald Eagle's sole owner, has never lived in the area of the proposed station and only proposes to move there in the event of a grant. Thus, Talleyrand is awarded maximum credit under this factor.

7. Talleyrand is also entitled to moderate enhancement credit for civic participation. Both of its owners have been engaged in civic activities for many years. These activities have included, in Mr. Barker's case, chairman of the Publicity and Program Committee of the Bellefonte Rotary Club, chairman of the Tuition Aid Committee of the Alliance School at State College, and volunteer work with the local fire company and the Christian and Missionary Alliance Church and Jewish Community Center, at State College. Mrs. Barker has been chairperson of the Christian Women's Club Planning Committee, at Bellefonte-State College, and has worked with the Centre County Christian Academy, at Bellefonte, and the Alliance School, at State College. Although the ALJ awarded Talleyrand only slight credit because many of its claimed activities were "either too long ago or two vague," *I.D.*, para. 44, we find the record establishes a pattern of civic participation over a long period of time up to the present, rather than a complete withdrawal from the civic scene which might result in significantly diminished credit. *See Radio Jonesboro, Inc., supra*, 100 FCC 2d at 947 n. 16; *Northern Sun Corp.*, 100 FCC 2d 889, 892-3 (Rev. Bd. 1985).[5] The Commission awards

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[5] Moreover, the ALJ appears to have erroneously discounted Mr. Barker's activities with the Bellefonte Rotary Club on the ground that they occurred after Talleyrand filed its application. *I.D.*, para. 44. We have held, however, that post-filing activities are entitled to credit, albeit "not as much as past record of such activities would warrant." *Bradley, Hand & Triplett*, 89 FCC 2d 657, 663 (Rev. Bd. 1982); *see also New Continental Broadcasting Co.*, FCC 85-33, released January 25, 1985, at n. 10. Here, Mr. Barker has both past and present civic participation.

credit because civic involvement indicates knowledge of and interest in the community to be served. *Policy Statement, supra*, 1 FCC 2d at 396. Here again, Talleyrand's record is clearly superior to Bald Eagle, whose owner offers no past participation in civic affairs or concomitant knowledge of the community. Accordingly, we will raise Talleyrand's credit to moderate.

8. The ALJ awarded Bald Eagle 100% enhancement credit for female participation based on Ms. Nolan's role and 49% credit to Talleyrand because of Mrs. Barker's involvement. On the basis of this differential, together with Bald Eagle's advantage in broadcast experience (*see* para. 9, *infra*), the ALJ awarded Bald Eagle a preference. We will withhold any female enhancement credit in this case for two reasons. First, such credit here would not be decisional. That is, even if we affirmed the ALJ's preference to Bald Eagle, its advantage in female participation (100% v. 49%) is not as great as Talleyrand's advantage in local residence (100% v. 0%) and is probably offset by Talleyrand's enhancement for civic participation. Second, we note that there is confusion as to whether the Commission any longer supports a female preference. Although the Court of Appeals vacated the panel decision in *Steele* v. *FCC*, No. 84-1176 (D.C. Cir. August 23, 1985) — (*See Order, Steele* v. *FCC*, No. 84-1176 (D.C. Cir. October 31, 1985) — the Commission appears to have been satisfied with the panel decision, having not appealed from it. Our concern in this regard is corroborated somewhat by statements in the broadcast trade press that the "Commission had been content to have the [female] preference killed," *Broadcasting*, November 11, 1985 at 74 and that a "Commission official said . . the agency is willing to live with the [panel] decision." Id., at p. 75. The Board, of course, applies only current Commission policy, *see Horne Industries, Inc.*, 91 FCC 2d 1193 (Rev. Bd. 1982), but because there exists some confusion and the matter is not decisional here, we will not attempt a resolution.

9. Both applicants have broadcast experience. Because Bald Eagle's 100% owner, Ms. Nolan, has such experience whereas only Talleyrand's 51% owner, Mr. Barker, has the same, the ALJ awarded Bald Eagle (in conjunction with its female advantage) a preference. *I.D.*, para. 46. We agree that Bald Eagle has the advantage in this category but find it to be somewhat offset by the fact that Mr. Barker's broadcast-related work began in 1967 whereas Ms. Nolan's began ten years later. Nevertheless, its greater ownership involvement in this area entitles Bald Eagle to a modest preference for past broadcast experience.

10. *Comparative Summary*. Neither applicant has received a diversification preference. Because both propose 100% full-time integration, the case turns on the respective qualitative enhancements. Talleyrand has been awarded substantial credit for local residence and moderate credit for civic participation whereas Bald Eagle receives a modest preference for broadcast experience. Thus, it is very evident that Talleyrand's overwhelming advantage for local residence (100% long-term vs. 0%), a factor the Commission considers "fundamental" and entitled to "substantial weight" in comparative proceedings, *see Radio Jonesboro, Inc.*, *supra*, 100 FCC 2d at 945-6, is the outstanding comparative difference in this case. Bald Eagle's advantage for the "minor" factor of broadcast experience is too insignificant to compensate for Talleyrand's significant local residence credit. *See Policy Statement, supra*, 1 FCC 2d at 396; *Cannon's Point Broadcasting Co.*, 93 FCC 2d 643, 653 (Rev. Bd. 1983). In sum, while the differences here are not vast, they entitle Talleyrand to a slight overall integration preference. Since this is the only preference that may be awarded for best practicable service to the public in this case, *see Policy Statement, supra*, 1 FCC 2d at 394,[6] Talleyrand will receive the grant.[7]

11. ACCORDINGLY, IT IS ORDERED That the petition for leave to exceed the 50 page limitation of Section 1.277(c), filed

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[6] Both applicants propose to install auxiliary power equipment and are thus equal in this regard. *See I. D.*, para. 45.

[7] Because of the result reached here, we need not decide Talleyrand's challenge to the *bona fides* of Dolores Nolan's integration proposal. Had the result been otherwise, however, we note that substantial questions have been raised on this record which might have required a remand. Specifically, Talleyrand alleges that Jimmie C. George, Bald Eagle's treasurer and one of its two directors, will actually control the station and that Ms. Nolan is merely a "front." In support, it cites record evidence that Ms. Nolan was introduced to the Bald Eagle application by Mr. George's son who had petitioned the Commission to have the subject channel assigned to Bellefonte; that Mr. George has paid all of Bald Eagle's expenses to date and is the applicant's sole provider of funds; that although he is said to be lending Bald Eagle the money, there is no written loan agreement; and that Ms. Nolan, the putative 100% owner, owns only one share of the 1,000,000 authorized shares of Bald Eagle's common stock. Talleyrand Br. at 19-22. The ALJ did not evaluate this evidence in his *I. D.*, and, as noted, it would serve no present purpose to examine it further; however, we repeat that it raises serious doubts as to the nature of Bald Eagle's application. *See KIST Corp.*, 57 FCC 2d 49 (1984), *modified*, FCC 85-512, released September 24, 1985; *Family Media, Inc.*, FCC 85R-85, released October 24, 1985.

It is also unnecessary, in light of our conclusions, to reach Talleyrand's exception that the ALJ should have granted its March 15, 1984 petition to add an issue against Bald Eagle for not reporting broadcast interests of Jimmie George's sister and son.

July 17, 1985 by Talleyrand Broadcasting IS GRANTED; that the petition for leave to amend, filed June 11, 1985 by Bald Eagle Media, Inc., as supplemented June 14, 1985, IS GRANTED; that the petition for leave to amend, filed June 21, 1985, by Talleyrand Broadcasting IS GRANTED; that the petition for leave to amend, filed October 3, 1985, by Bald Eagle Media, Inc., IS GRANTED; and that the amendments ARE ACCEPTED; and

12. IT IS FURTHER ORDERED, That the application of Talleyrand Broadcasting (File No. BPH-821012AI) for a construction permit for a new FM station at Bellefonte, Pennsylvania IS GRANTED, and the application of Bald Eagle Media, Inc. (File No. BPH-830214AF) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

NORMAN B. BLUMENTHAL, *Member, Review Board*

FCC 85D-37

## BEFORE THE
## FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

| In re Applications | |
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| Walter D. Barker and Kay F. Barker,<br>d/b/a TALLEYRAND BROADCASTING<br>Bellefonte, Pennsylvania | MM DOCKET<br>NO. 84-98<br>File No.<br>BPH-821012AI |
| BALD EAGLE MEDIA, INC.<br>Bellefonte, Pennsylania | MM DOCKET<br>NO. 84-100<br>File No.<br>BPH-830214AF |
| For Construction Permit for a New FM Station | |

### *Appearances*

*Jeffrey D. Southmayd* and *Michael R. Miller* on behalf of Talleyrand Broadcasting; *Burce A. Eisen, Alan G. Moskowitz* and *Lawrence Bernstein* on Behalf of Bald Eagle Media, Inc.; and *Brian P. Kilbane* on behalf of Chief, Mass Media Bureau, Federal Communications Commission.

## INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE BYRON E. HARRISON

Issued: May 23, 1985; Released: May 30, 1985

### *Preliminary Statement*

1. The captioned applicants were designated for hearing by *Hearing Designation Order*, 49 Fed. Reg. 05674, published February 14, 1984, with that of Nittany Communications, Inc. (Nittany), on the following issues:

(a) To determine whether there is a reasonable possibility that the tower height and location proposed by Talleyrand, Nittany and Bald Eagle would constitute a hazard to air navigation;

(b) To determine which of the proposals would, on a comparative basis, best serve the public interest; and

(c) To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

2. In addition, because data submitted by the applicants indicated there would be significant differences in the size of the areas and populations which would receive service from the respective proposals, the areas and populations which would receive service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, were to be considered as part of the standard comparative issue. *Designation Order*, para. 13.

3. On April 25, 1984, Nittany filed a Notice of Withdrawal of Application. By *Order*, FCC 84M-2336, released May 17, 1984, the application of Nittany was dismissed.

4. On April 25, 1984, Talleyrand filed a Motion for Partial Summary Decision on the air hazard issue specified against it. By *Order*, FCC 84M-2409, released May 23, 1984, the Motion was granted and Issue 1 resolved in Talleyrand's favor.

5. On June 26, 1984, Bald Eagle filed a Motion for Summary Decision with respect to its air hazard issue. A related Petition for Leave to Amend was filed on July 5, 1984, and supplemented on July 16, 1984. At hearing (Tr. 14) and by *Order*, FCC 84M-3202, released July 20, 1984, both the Motion and Petition were granted and Issue 1 resolved in Bald Eagle's favor.

6. On March 15, 1984, Talleyrand filed a Petition to Enlarge Issues against Bald Eagle. At hearing (Tr. 15-19) and by *Order*, FCC 84M-3202, released July 20, 1984, the Petition was denied in it entirety.

7. On July 16, 1984, Bald Eagle filed a Petition to Enlarge Issues against Talleyrand. This Petition sought to add a cross-interest policy issue against Talleyrand which Petition was denied at a hearing conference held on March 8, 1985, and confirmed by *Order* issued March 12, 1985. Both Talleyrand and Bald Eagle have filed timely Proposed Findings of Fact and Conclusions of Law and Reply Findings and Conclusions.

8. At the July 17, 1984, hearing, the Presiding Judge considered a stipulation of the parties which would render moot consideration of the areas and populations to be served by the applicants under the standard comparative issue. At Tr. 115-116 and by *Order*, FCCF 84M-3202, released July 20, 1984, the Presiding Judge accepted the stipulation and found consideration of areas and populations to be moot.

9. A prehearing conference took place on April 26, 1984. The hearing was held on July 17, 1984, and the record closed on that date, subject to possible reopening in the event that Bald Eagle's Petition to Enlarge Issues is granted. As noted in paragraph 7, the Petition was denied.

## *Findings of Fact*

### *Talleyrand*

10. Talleyrand is a General Partnership comprised of Walter D. Barker, 51% owner, and Kay F. Barker, 49% owner. Walter and Kay Barker are husband and wife. They reside in State College, Pennsylvania, within the proposed city grade contour of their facility. They have resided at this address since 1967. Mr. Barker claims continuous residency within the proposed city grade contour since 1959 (Talleyrand Exhibit 1, p. 1; Exhibit 2, p. 1).

11. The proposed Talleyrand station would have auxiliary generating equipment to assure continued operation during electrical power outages (Talleyrand Exhibit 1, p. 1).

12. Walter D. Barker resides at 360 Lightner Street, State College, Pennsylvania. He has lived at this address since 1967 and has lived continuously within the proposed 3.16 mV/m contour area of the proposed Talleyrand FM station for Bellefonte, Pennsylvania, since 1959. State College, Pennsylvania, is located within the 3.16 mV/m contour of Talleyrand's proposed station (Talleyrand Exhibit 1, p. 1). The State College-Bellefonte area constitutes a single "centre region" broadcast market comprised of Bellefonte and its environs and State College and its environs (Tr. 34–35).

13. Should Talleyrand's application for Bellefonte be approved by the FCC, Mr. Barker will work full-time, a minimum of 40 hours per week, as the General Manager of the station. As General Manager, he will be responsible for supervising the overall management and operation of the proposed station, including choosing programming in conjunction with the Sales Manager, directing the EEO program and supervising finances and technical matters. He will also monitor the sales program by coordinating with the Sales Manager. He will maintain his present residence which is within the proposed 3.16 mV/m contour of the Bellefonte station (Talleyrand Exhibit 1, p. 1).

14. Mr. Barker holds a degree in electrical engineering from Pennsylvania State University. From October 1967 to February 1981, Mr. Barker was lead Technician at the University, working

on the technical operation and maintenance of the school's radio and televison facilities. From March 1979 to the present, Mr. Barker has served as Chief Engineer of Station WTLR-FM in State College (Talleyrand Exhibit 1, pp. 3-4). Mr. Barker states that his title of Chief Engineer at WTLR is somewhat of a misnomer as, in fact, he holds a significant managerial position at WTLR-FM (Tr. 54). His written prepared testimony makes it clear that he was an important policymaking official of the station:

> While my official title is Chief Engineer, [Mr. Barker testifies,] I have been involved in various management duties. I have been in charge of the technical management of WTLR which has included responsiblity over the selection and supervision of contractors to construct and maintain the station's physical plant. I have also acted as an advisor to the General manager on fund raising, personnel policy and the long-term goals of WTLR. I report directly to the Board of Directors on various policy areas (Talleyrand Exhibit 1, p. 4).

His oral testimony elaborated on the significance of his position at WTLR as a policymaking executive. He has participated in the selection of non-engineering employees at WTLR, including the hiring of on-air personnel (Tr. 49). He has advised the General Manager on programming matters, was involved in making and presenting the annual WTLR budget (Tr. 49) as well as decisions on moving the station studio and transmitter site and a possible power increase for the station (Tr. 50). At paragraph 12 of Mr. Barker's written testimony (Talleyrand Exhibit 1, p. 5), he stated an intention to terminate his duties at WTLR if Talleyrand's application is granted; he admitted at the hearing that he did not express such an intention prior to his testimony in July 1984 (Tr. 62).

15. Mr. Barker states he has no other ownership interest in any medium of mass communications (Talleyrand Exhibit 1, p. 5).

16. Mrs. Kay F. Barker presently resides at 360 Lightner Street, State College, Pennsylvania. She has lived at this address and within the proposed 3.16 mV/m contour area of the proposed Talleyrand station since 1967. She has resided within the proposed 1 mV/m contour area of the station since 1953 (Talleyrand Exhibit 2, p. 1).

17. Mrs. Barker proposes to be employed full-time — a minimum of 40 hours per week — at the station as the Sales Manager. As Sales Manager, she will supervise the station's sales program and sales employees. She will also be involved in making programming decisions in conjunction with the General Manager.

In the absence of the General Manager, she will be responsible for all areas of station operation (Talleyrand Exhibit 2, p. 1). Mrs. Barker was a sales representative for Avon in 1975 and has worked as a salesperson for Johnson's Home Furnishings in Bellefonte, Pennsylvania, from 1979 to 1980 (Talleyrand Exhibit 2, p. 1). However, Mrs. Barker has no prior broadcast experience and has never held a supervisory-type job in prior non-broadcast sales experience (Tr. 88–89).

18. Both Mr. and Mrs. Barker state that they have been involved in local civic activities within the proposed Talleyrand service area. Mr. Barker lists the following such activities (Talleyrand Exhibit 1, pp. 2–3):

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| June 1970–present | Volunteer member, Alpha Fire Co., State College, Pennsylvania. |
| | (1975–76) Truck Company Captain. |
| | Presently and formerly a member of various Fire Company committees. |
| 1975–present | Volunteer technical advisor to Christian and Missionary Alliance Church and Jewish Community Center, State College, Pennsylvania. |
| Date not given | Volunteer speaker on fire safety and treatment of animals: to the Women's Club, Boy Scouts, kennel clubs, local schools and 4-H Club, State College — Bellefonte area. |
| 1976–1984 | Member, Nita-Nee Kennel Club of Centre County, Pennsylvania. |
| | (1978–1980) Club President. |
| Date not given | Provided tracking dogs to locate lost pesons, contraband and explosives. |
| 1977–1980 | Volunteer, Centre County Junior Museum Summer Program. |
| June 1979–September 1981 | Chairman, Tuition Aid Committee, Alliance School, State College, Pennsylvania. |
| Present | Member and Chairman — Publicity and Program Committee, Bellefonte |

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| | Rotary Club. |
| Present | Chairman, Centre County Treasure Hunt (participant in the "Hunt" for 11 years. |

19. Mrs. Barker lists the following activities in her testimony (Talleyrand Exhibit 2, pp. 2-3):

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| 1954-1956 | Brownies and Girl Scouts, Pine Grove Mills, Pennsylvania. |
| 1961-1964 | Member, State College Order of Rainbow for Girls. |
| 1963-1964 | Volunteer "candy striper," Willowbank Unit, Centre County Hospital, Bellefonte, Pennsylvania. |
| "Various times since 1967" | Volunteer, Heart fund, Cancer Fund, United Way, Centre County, Pennsylvania |
| 1971-present | Guide, Bible Study groups, Christian Women's Club, Bellefonte-State College, Pennsylvania. |
| 1973-1983 | Teacher, Christian and Missionary Alliance Church Bible School, State College, Pennsylvania. |
| 1972-1976 | Chairperson, Christian Women's Club Planning Committee (Treasurer, 1973-1975), Bellefonte-State College, Pennsylvania. |
| September 1974-May 1976 | Leader, Pine Grove Mills Brownie Scout Troop, Pine Grove Mills, Pennsylvania. |
| 1976-1979 | Lunch aide, Alliance School, State College, Pennsylvania. |
| 1977-1980 | Secretary, Alliance School Board of Directors, State College, Pennsylvania. |
| 1977-1980 | Leader/Coordinator, Pioneer Girls, State College, Pennsylvania. |
| Present | Member, Centre County Christian Academy Sports Booster Club, Bellefonte, Pennsylvania. |

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| September 1981-present | Member, Parent-Teacher's Fellowship, Center County Christian Academy. |

20. During the hearing, however, Mr. Barker acknowledge that, aside from informal and infrequent conversations, he has provided no advice to the State College Jewish Community center for some three to five years (Tr. 63-64). The last time he spoke to the Women's Club was four to five years ago (Tr. 66). He is not presently a volunteer for the Centre County Junior Museum summer program (Tr. 67). He is no longer Chairman of the Alliance School Tuition Aid Committee (*Id.*) The Centre County Treasure Hunt is merely a social get-together strictly for purposes of entertainment (Tr. 67-68).

21. During the hearing, Mrs. Barker testified that she has had no involvement with the Brownies or Girl Scouts since 1956 (Tr. 108). She has not been a member of the State College Order of Rainbow for girls since 1964 (*Id.*). Likewise, she has not been a volunteer "candy striper" since 1964 (*Id.*). Her volunteer work for the Heart Fund, Cancer Fund and United Way she describes as "off and on," she simply helps "[w]hen asked" (*Id.*).

22. Mrs. Barker is not and never has been an officer of the United Way, the Cancer Fund or the Heart Fund (Tr. 108-109). By "Guide" to Bible Study Groups, Mrs. Barker testified that she would lead a group of women in a Bible study once a week, two hours at a time, over a ten-week period (Tr. 109-110). She is not presently a teacher at the Christian and Missionary Alliance Bible School. The teaching program descibed in her written testimoy consists of one week's activities per year (Tr. 110). She has not been Chairperson since 1976 or Treasurer since 1975 of the Christian Women's Club Planning Committee (Tr. 110). She has held no other offices on the Committee since 1976 (*Id.*). Her being "Leader" of the Pine Grove Mills Brownie Schout Troop was similar to being a den mother for the Cub Scouts — in any event, she has not been a "Leader" since 1976 (*Id.*). She has not been a Lunch Aide at the Alliance School since 1979. That activity involved watching over the school children during the lunch hour; Mrs. Barker had children of her own in the school at the time (Tr. 11-112). She is not presently secretary to the Alliance School Board of Directors and has not been since 1980 (Tr. 112). She is not a member of the Board of Directors today (*Id.*). She is no longer Leader/Coordinator of the Pioneer Girls and has not been since 1980 (*Id.*). She is not, and never has been, an officer of the Centre County Christian Academy Sports Booster

Club (*Id.*). She is not and never has been an officer of the Centre County Christian Academy Parent-Teachers Fellowship, an activity which she likened to the PTA (Tr. 112-112).

*Bald Eagle*

23. Bald Eagle is a Pennsylvania corporation organized for the purpose of applying for a new FM broadcast station on Channel 237A at Bellefonte, Pennsylvania (Bald Eagle Exhibit 1).

24. Dolores C. Nolan, a female, is President, a Director and 100% stockholder of Bald Eagle (Bald Eagle Exhibit 1; Tr. 137). Jimmie C. George is Treasurer and a Director of Bald Eagle. He has no stock or other ownership interest in the applicant (Bald Eagle Exhibit 1; Tr. 142, 144, 187).

25. Neither Bald Eagle, its stockholder, nor either of its officers or directors has any interest in any media of mass communications (Bald Eagle Exhibit 1).

26. Bald Eagle proposes to install an auxiliary generator to be used in the event of an emergency or whenever there is a loss of normal utility service (Bald Eagle Exhibit 1).

27. Dolores C. Nolan was born in Dublin, Ireland. She was brought to this country as a very young child and became a naturalized United States citizen in November 1963. Since coming to this country, Ms. Nolan has resided exclusively in Pennsylvania (Bald Eagle Exhibit 2, p. 1).

28. Ms. Nolan received a Bachelor of Science degree in Communications from Marywood College, Scranton, Pennsylvania, in 1977. Her field of concentration was radio and television. In January 1977, while attending college, Ms. Nolan became an intern at Stations WEJL(AM) and WEZX(FM) in Scranton (Bald Eagle Exhibit 2, p. 1; Tr. 188).

29. In March 1977, Ms. Nolan was hired as a full-time traffic person at Stations WGBI AM and FM, also in Scranton. In this capacity, she worked on scheduling for the stations' daily program logs and was responsible for the scheduling of news broadcasts, commercials and public service announcements for both stations (Bald Eagle Exhibit 2, p. 1; Tr. 188-189).

30. In July 1977 and until October 1979, Ms. Nolan returned to stations WEJL and WEZX as full-time Traffic Manager for the stations. There she was responsible for all scheduling on the program logs. In addition, she worked in production and as an on-air voice for station-produced commercials (Bald Eagle Exhibit 2, p. 1; Tr. 189).

31. In October 1979, Ms. Nolan joined Station WBQW(AM) in Scranton. Although hired as full-time station receptionist and secretary to the General Manager, Ms. Nolan was subsequently given and took on numerous other responsibilities. She became the weather anchorperson, morning "traffic watch" reporter, writer, producer and talent for commercials. In addition, Ms. Nolan became a part-time week-end disc jockey and assisted the General Manager in conducting station promotions (Bald Eagle Exhibit 2, pp. 1–2; Tr. 190–192).

32. Ms. Nolan remained at Station WBQW until the autumn of 1981 when she rejoined Stations WGBI AM and FM in Scranton. This time, she had the title of Continuity Director. She worked full-time at the stations, was also involved in writing and producing commercials, assisting the Sales Manager and acting as Liaison with the station's program service, Drake-Chenault, and CBS Radio, which supplied the stations' adult-contemporary news format (Bald Eagle Exhibit 2, p. 2; Tr. 192).

33. In October 1982, while working at WGBI AM and FM, Ms. Nolan simultneously took on the additional responsibility of week-end weather anchorperson at TV Station WDAU in Scranton. There, she handled the station's televised weather forecasts on the 6 and 11 o'clock news during the week-ends (Bald Eagle Exhibit 2, p. 2; Tr. 192–193). Ms. Nolan worked full-time, Monday through Friday, at the WGBI stations, and week-ends at WDAU until March 983.[1] *Id.*

34. If Bald Eagle's application is granted, Ms. Nolan will resign her present employment and relocate her residence to within the station's proposed service area. She intends to be the full-time Station Manager. As such, Ms. Nolan will be responsible for the day-to-day operation of the station, working at least 40 hours per week in this capacity. She will be in charge of the station's EEO program, will hire and fire station employees and be the person ultimately responsible for "everything associated with this station." She will hire a Program Director and would supervise that person, with final responsibility fo the station's programming. She would hire a Chief Engineer and a Sales Manager. She would coordinate station policy and programming, oversee the sales department and possibly become involved in selling time herself,

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[1] Ms. Nolan was terminated from employment at both the WGBI stations and at WDAU in March 1983 because of her filing of the Bald Eagle application on February 14, 1983 (Tr. 194–195). Because of this, Ms. Nolan was unemployed from March until July 1983 (Tr. 194).

as circumstances dictate. Ms. Nolan would also be the executive responsible for meeting with community leaders and with members of the general public, thus assuring continued station awareness of pressing community problems and needs. She would hire a business manager/bookkeeper for station billing and collections; Ms. Nolan would monitor this person. All station personnel, directly or indirectly, would report to Ms. Nolan, the chief executive of Bald Eagle's station in Bellefonte, Pennsylvania (Bald Eagle Exhibit 2, pp. 2–3; Tr. 202–07).

## *Conclusions*

35. The sole issue for disposition at this time is the standard comparative issue.[2] The primary source for resolution of that issue is the Commission's *Policy Statement on Comparative Broadcast Hearings* (Policy Statement), 1 FCC 2d 393 (1965). There are two primary objectives toward which the process of broadcast applications comparison should be directed: (1) the maximum defusion of control of the media of mass communications; and (2) the best practicable service to the public.

### *Diversification of Control of the Media of Mass Communications*

36. Talleyrand seeks a conclusion that since neither applicant or any of their respective principals own any interest in the media of mass communications, the resolution of the proceeding must be based solely upon the best practicable service to the public. Bald Eagle on the other hand urges that while Bald Eagle has no cognizable interest in any media of mass communications, the same cannot be said of Talleyrand. It is clear from the record that while the Talleyrand partners have no ownership interest in any medium of mass communications, Mr. Barker has acknowledged that he retains a significant managerial interest in Station WTLR–FM. Station WTLR–FM is a non-commercial station. Official notice is taken of the fact that WTLR–FM, located at State College, Pennsylvania, is adjacent to Bellefonte, Pensylvania, and that WTLR–FM places a city guide signal over State College. Further, Talleyrand, in its findings at paragraph 8, asserts that the state College-Bellefonte constitutes a single "Centre-region" broadcast market. While Mr. Barker has attempted at various times to make clear its intent to terminate his relationship with station WTLR–FM should Talleyrand prevail,

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[2] As noted *supra*, the air-hazard issue as specified against both Talleyrand and Bald Eagle has been resolved favorable to both applicants by summary decision. (See paragraphs 5 *and* 6.)

such commitment was not made prior to the "B" cut-off date. The record is likewise clear that while Mr. Barker's official title is Chief Engineer of WTLR-FM, he nevertheless has given extensive testimony as to his significant managerial interests. For example, he presents the annual WTLR engineering budget, he hires and fires engineering personnel; he is in charge of the station's technical management; he is responsible for ensuring that the station conforms to acceptable standards of engineering practice; he reports directly to the Board of Directors on matters of station policy; he has been consulted about station policy decisions regarding moving of studios, an increase in power and moving of a transmittor. He also has acted as an advisor to the General Manager on fundraising, personnel policy and long-term goals for WTLR, participated in the selection of on-air personnel and advised the General Manager on programming matters. Thus, the question becomes one of whether Mr. Barker is simply the "Chief Engineer" for Station WTLR-FM since 1979 as urged by Talleyrand or as urged by Bald Eagle, Mr. Barker is an important day-to-day policymaking official of WTLR which is a cognizable interest for diversification purposes. In addition, Mr. Barker's last minute promise at the hearing to divest himself of this interest is too late. An applicant is required to make a divestiture commitment of such an interest at the "B" cut-off date, well prior to hearing.

37. The *Policy Statement* characterizes diversification as "a factor of primary significance," constituting "a primary objective in the licensing scheme." 1 FCC at 394. Diversification is normally a decisive preference in comparative evaluations. *New Continental Broadcasting Co.*, 92 FCC 2d 830 (Rev. Bd. 1981); *Hassayampa Broadcasting*, 92 FCC 2d 472 (Rev. Bd. 1982).

38. As the *Policy Statement* holds at 1 FCC 2d 394 "[o]ther interests in the principal community proposed to be served will normally be of most significance, followed by other interests in the remainder of the proposed service area and, finally, generally in the United States." The fact that Talleyrand's principal's, Mr. Barker, ties are to a non-commercial station cannot be categorically ignored for such stations do have a vital impact on the overall diversification of control of the various mass media voices. True, it is not as formidable a force as a commercial station, but it is a decisional factor in this case. See *San Joaquin Television Improvement Corp.*, 55 RR 2d 1186 at 1189 (Rev. Bd. 1984). The *Policy Statement* and case law also establish that "significant managerial positions in stations and other media within and

without such areas will be considered [as tantamount to ownership under diversification] when held by persons with any ownership or significant managerial interest in an applicant." *WHW Enterprises, Inc.* 89 FCC 2d 799 (Rev. Bd. 1982). Also, just as in the case of ownership interest in other media, in order to avoid attribution of such interest, an applicant must make an unequivocal commitment prior to hearing, at the "B" cut-off date, that he will divest himself of this significant managerial interest. *Thomas C. and Essie L. Collins*, 93 FCC 2d 467, 468-9 (Rev. Bd. 1983). Acceptance of such a divestiture pledge after the cut-off date would, in the manner of any other untimely attempt to upgrade the application, be inappropriate since it would prejudice competing applicant. *WHW Enterprises, Inc., supra.*

39. Had Mr. Barker's interest in station WTLR-FM involved a commercial rather than a non-commercial station, Talleyrand would rate a diversity penalty that would have been absolutely dispositive of the case. However, it must be concluded that a diversification penalty must be given to Talleyrand and a diversification preference given to Bald Eagle.

### *Integration of Ownership and Management*

40. Both Bald Eagle and Talleyrand propoosed 100% full-time integration ownership into significant managerial positions. Thus, any preference to either party for integration must be based upon qualitative enhancement. Neither Bald Eagle nor Talleyrand have any participating minority ownership. Both, however, propose female ownership and participation. On this basis, a qualitative enhancement must be awarded to Bald Eagle. Bald Eagle will have 100% female ownership by its President and proposed Station Manager, Delores C. Noland. Talleyrand's proposal is enhanced by the 49% female ownership of Kay Barker, the proposed Sales Manager.

41. Local residence is another qualitative enhancement factor to be considered. Both Walter and Kay Barker have resided in the service area for a number of years, and Talleyrand is entitled to an enhancement credit for 100% local residence. Delores C. Noland does not now reside in the proposed coverage area, but proposed, upon a grant of the application, to resign her present employment and relocate her residence within the service area. Thus, while Bald Eagle merits some enhancement credit under the *Policy Statement* for her proposed future residence, such enhancement is subordinate to the already long-time local residence of Mr. and Mrs. Barker.

42. The broadcast experience of the respective applicants is another of the matters to be considered under enhancement factors. Ms. Noland (Bald Eagle) has worked in broadcasting for over seven years in a variety of capacities. Not all of this experience has been at the management level. But, her experience does demonstrate that with the passage of the years she has been assigned more important duties which do involve managerial functions.

43. Kay Barker (Talleyrand) has no broadcast experience. However, Walter Barker does have extensive past broadcast experience at the management level. In conclusion, enhancement credit will be afforded to Bald Eagle on a 100% basis for Ms. Noland and on a 51% basis for Mr. Barker (Talleyrand).

44. Local civic activity is another basis for enhancement credit. Ms. Noland can claim no enhancement in this area. Mr. and Mrs. Barker have made substantial claims, but such claims must be discounted. It appears that much of the claimed civic activities of Mr. and Mrs. Barker is either too long ago or too vague to be entitled to full credit. Further, Mr. Barker claims credit for his position as Chairman of the Publicity and Program Committee of the Bellefonte Rotary Club and Chairman of the Centre County "Treasure Hunt." Mr. Barker became a member of the Rotary Club after he filed his Talleyrand application and the "Treasure Hunt" appears to be more in the nature of a social outing among friends. In conclusion, Talleyrand is entitled to, at most, some slight enhancement credit for civic participation.

45. Last, both applicants propose the installation of an auxiliary generator to be used in the event of emergency or power outage. Accordingly each applicant is entitled to equal preference as to auxiliary power.

## *Ultimate Conclusions*

46. From the proceeding analysis, both Bald Eagle and Talleyrand propose 100% full-time integration of ownership and management so both are equal under this integration criterion. Likewise, both applicants are close in the overall evaluation of the enhancement credits which would enable one applicant to an overall preference under integration. Bald Eagle is entitled to 100% enhancement credit for female participation while Talleyrand entitled to 49% credit. Bald Eagle is entitled to 100% enhancement credit for past broadcast experience while Talleyrand is entitled to 51% credit in this category. Based on these two categories, standing alone, Bald Eagle is entitled to a preference.

However, Talleyrand has 100% enhancement credit for local residence while Bald Eagle is entitled to none or at best, slight credit for Ms. Nolan's intent to move to the service area if that application is granted. Talleyrand is entitled to credit for civic participation, but such credit must be discounted by almost one-half in view of nature of such activities as shown in the record. Lastly, both applicants are equal on the basis of a proposal for auxiliary power.

47. If integration and the enhancement factors were the sole basis for decision, this would be a very close case. However, Talleyrand does rate a demerit for Mr. Barker's continuing significant managerial position at WTLR-FM which is within the proposed service area of the Talleyrand station. This demerit does not rise to the level of being absolutely decisional since Mr. Baker's position is that of a management level employee with a non-commercial station. It is not possible on this record to assess with any precision the relative weight to be assigned to this demerit; it does exist to the extent that it must be considered for decisional purposes. Accordingly, Talleyrand is assessed a demerit under diversification. Thus, while Talleyrand and Bald Eagle are virtually equal under the integration criteria, a demerit for diversification is assigned to Talleyrand, and under the facts of the case, the demerit becomes decisional. Thus, it is concluded that the public interest will be better served by a grant of the Bald Eagle application and a denial of the Talleyrand application.

Accordingly, IT IS ORDERED, that unless an appeal is taken from the Initial Decision, or the Commission reviews it on its own motion, the application of Bald Eagle IS GRANTED, and the application of Talleyrand IS DENIED.[3]

FEDERAL COMMUNICATIONS COMMISSION

BYRON E. HARRISON, *Administrative Law Judge*

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[3] Under Rule 1.276, appeals (in the form of exceptions to the Initial Decision) must be filed within thirty (30) days of the public release of the full text hereof, unless an extension of time is granted. In the event no exceptions are filed and the Commission has not undertaken to review the Initial Decision during the prescribed 50-day period or taken any of the actions specified in paragraph (c) of Rule 1.276, the Initial Decision becomes effective pursuant to paragraph (c) of Rule 1.276.

Application, Amendment of, Right to File
Application, Not Acceptable for Filing
Financial Qualifications Availability of funds
Notice, Sufficiency of
Reconsideration, Petition for, Treated as Appropriate for Review

> Order on Reconsideration adopted regarding the return of Round IV cellular applications for failure to independently demonstrate the financial qualifications of the applicants referred to Commission in order to reach a final decision on acceptability for filing with a minimum of delay. Pre-lottery amendments to correct defects not allowed. Reconsideration denied concerning 49 of the applications containing bank letters which made a financial commitment to the "merged entity" resulting from effectuation of a pre-filing agreement. Reconsideration granted for one application because bank letter did evidence independent demonstration of applicant's qualifications. Reconsideration granted for 18 other applications containing bank letters addressed to "Dear Applicant" that were found to include all essential terms, and to satisfy the independent demonstration requirement.
> — *Vineyard Cellular Communications*

FCC 86-43

## BEFORE THE
## FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re

Petitions for Reconsideration of the
Return of Round IV Cellular Applications
for Lack of Individual Financial
Commitment in Bank Letters.

### ORDER ON RECONSIDERATION

Adopted January 17, 1986; Released January 24, 1986

BY THE COMMISSION:

1. Various Round IV cellular applicants seek reconsideration of

the actions of the Chief, Mobile Services Division, returning their applications as unacceptable for filing. The petitions have been referred to the Commission under Section 1.106(a) in order to expedite resolution of the matters raised. The primary reason for return of the applications listed in the Attachment hereto was the failure of tendered bank letters to independently demonstrate each applicant's financial ability to meet the total first year projected costs of the cellular systems proposed. Accordingly, the listed applications have been consolidated for reconsideration.

## *Discussion*

### *A. Vallejo and Evansville Applications*

2. A group of 25 applicants each filed non-wireline applications for both the Vallejo and Evansville cellular markets. The involved Vallejo and Evansville applicants were part of pre-filing settlement agreements with Roam-Tel Communications d/b/a Vineyard Cellular Communications (Vineyard) in Vallejo and Roam-Tel Communications of Evansville (Roam-Tel) in Evansville.[1] Each of the involved Vallejo and Evansville applications included letters from the Wells Fargo Bank which: (1) recognized the existence of the pre-filing agreements; (2) identified the merged interests resulting from effectuation of the pre-filing agreements as the "Merged Entity"; and (3) agreed to loan a specific amount of money[2] to the "Merged Entity." Since the commitment of the bank did not appear to be to the applicant, the Division determined that each of the involved applications was defective for failure to demonstrate independently the financial ability of the applicant to meet the projected costs in accordance with the requirements established in *Cellular Lottery Rulemaking*, 98 FCC 2d 175 (1984), at 201 fn. 73; and *Public Notice*, Report No. CL-75, "Cellular Application Filing Policies," June 6, 1984, para IV. p. 3. As a result, the Division also concluded that each applicant had not demonstrated the availability of funding for construction and operation of the system for one year pursuant to Rule 22.917(a).

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[1] Vineyard and Roam-Tel were designated as the surviving applicants. Both of the surviving applications were filed by Roam-Tel Communications, in which the controlling and managing partner is Roam-Tel Partners. See Exhibit, "Principals/Legal Data," in both applications, File Nos 34439-CL-P-111-A-84 and 33071-CL-P-119-A-84. Each of the other applicants in both markets states in its application that upon acceptance of the application for filing, it is to receive a minority interest in Roam-Tel Partners.

[2] The amount of money specified in the Vallejo and Evansville bank letters was sufficient to cover the construction and first year operating costs for the identical systems proposed for each market.

All 50 common applications were returned as unacceptable for filing. The Vineyard application was also returned for identical reasons.

3. Joint Petitions for Reconsideration were filed on behalf of the 25 common Vallejo and Evansville applicants. Vineyard also filed a Petition for Reconsideration.[3] The common applicants assert that the bank letters from the Wells Fargo Bank were addressed to the applicants individually and contained all of the terms required by the Commission. The applicants further contend that in its recognition of the pre-filing settlement agreement, the bank gave a reasonable assurance of financing to each individual applicant as a member of the settlement group, which it terms the "Merged Entity."[4] The applicants argue that the bank's recognition of the pre-filing agreements does not affect the individualized nature of the financial showings. The applicants submit that the Division has failed to consider the bank's recognition of the pre-filing agreements, and, therefore, has effectively amended the rules for markets 91–120 by proscribing the use of pre-filing agreements without the requisite authority. In addition, the applicants contend that because the Bureau allowed other applicants, whose applications the Division had found initially to be defective for other reasons, to rectify their misunderstanding about other specific requirements for filing in the Round IV markets, consistent application of all Round IV criteria requires a similar substantial compliance standard for the instant applications.

4. We conclude that the arguments of the common Vallejo and Evansville applicants are without merit. In the *Cellular Lottery Rulemaking*, we explicitly cautioned applicants to demonstrate clearly their financial qualifications. We specified that each applicant must file an individually acceptable application, 98 FCC 2d at 201 fn. 73, stating "To be acceptable, a cellular application should clearly demonstrate the *applicant's* . . . financial qualifications." *Id.* at 214 (emphasis added). The Common Carrier Bureau later emphasized that in cases where multiple parties filed separate applications with the intention of subsequently forming a

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[3] The involved Vallejo applications are listed in the Attachment by file numbers containing market designation number 111; the Evansville applications, similarly, by number 119.

[4] The bank letters define this term as a merger of lottery chances and cellular interests of the individual applicants in Vallejo and Evansville into Vineyard and Roam-Tel, respectively. The letters also recognize the Vineyard and Roam-Tel applications as the surviving ones; if any of the "Merged Entity's" lottery chances is selected.

joint venture, each individual applicant must be the real party in interest behind its application. *Public Notice*, Report No. CL-75, "Cellular Application Filing Policies," June 6, 1984, para. IV, p. 3. Thus, the Commission has made clear its requirement that all applicants in pre-filing settlement agreements must demonstrate their financial qualifications independently of the surviving applicant.

5. The subject applications are mass-marketed, non-exclusive applications, proposing in each market, the same cellular system coverage and consumer service based upon the same engineering and estimates of subscriber demand by the same preparers. The differences among them consist only of the applicant's name, list of ownership interests, and balance sheets.[5] The applications were filed separately by the multiple applicants who agreed to form a post-filing joint venture. Given these circumstances, these applicants were clearly required to make an independent showing of their financial qualifications. *Public Notice*, CL-75, *supra*. Such a demonstration is not evident on the face of the bank letters in these applications. The bank letters state that the amount which is needed to construct and operate the proposed system will be loaned to the "Merged Entity", the joint venture group formed after effectuation of the applicants' pre-filing settlement agreements. There is no indication that the bank has any willingness to lend money to the individual applicant to whom the letter is addressed. Further, the letter is explicit that it is Roam-Tel Partners, the managing and controlling partner of the surviving applications,[6] which provided the financial data which the bank reviewed in agreeing to make the loan commitment. It is clear that the individual applicants neither presented their own financial qualifications to, nor requested a loan from, the bank. In sum, the commitments for the loans are to the surviving applicants alone.

6. The applicants' assertion that the bank is making its assurance to them as individual members of the merged entity settling group is unsupportable. Applicants submit as a clarifying response to the Bureau's action a letter from the bank stating that its financial assurance was given to each individual applicant as a member of the settling group. The letter is an amendment. As such, it cannot be accepted pursuant to Section 22.918(b) of

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[5] Except for the names of the applicants, the involved market, the surviving applicant, and the loan amount, the bank letters submitted by the common applicants are also the same.

[6] *Supra*, note 1.

the Rules, which prohibits the filing of pre-lottery amendments for markets below the top 90. *See Digital Transmission Corporation*, Mimeo 6705, released August 30, 1985. Moreover, even if we were to accept the bank's clarifying letter, the applications would still not satisfy the independent financial ability demonstration requirement. Here, the bank's mere recognition of a settlement agreement and the applicant's interest in it does not constitute the independent demonstration required. The bank letter expressed no willingness to lend to each applicant apart from the applicant's relationship to the surviving application. Without an independent showing, each applicant becomes reliant on the qualifications of the surviving applicant. Thus, if the surviving application was determined to be defective and was returned, or if the partnership were not in fact formed, the ability of each of these applicants to maintain the acceptability of its own application throughout the licensing process would disappear. We find that the common applicants have failed to independently demonstrate their financial qualifications as required.

7. Finally, the applicants urge that because the Bureau accepted other applications in Round IV under relaxed pre-screening standards, consistency in the application of the Commission's cellular policies requires that similar treatment be accorded to these applicants pursuant to *Green Country Mobilephone, Inc. v. FCC*, 765 F. 2d 235 (D.C. Cir. 1985). However, the applicants overlook the justification for the Bureau's previous actions. The Public Notice cited by Petitioners[7] was issued because of a widespread confusion among applicants regarding the evidence necessary to satisfy the 75% CGSA coverage "demonstration" requirement of Section 22.903(a) of the Commission's Rules and regarding the Section 22.15(a)(1) requirement to provide reasonable assurance of site availability. The same circumstances do not exist here. The guideline for the financial showing required of applicants, like these, in a pre-filing agreement not only was explicit, *Cellular Lottery Rulemaking, supra*, but was clarified further in *Public Notice* CL–75, *supra*. The common understanding of this guideline has been demonstrated by the large number of applicants in other markets who were likewise part of a pre-filing settlement group and were found to have made the required independent financial showing.[8] Accordingly, we conclude

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[7] *Public Notice*, Report No. CL–304, released April 26, 1985.

[8] *See e.g.* application of David Bonderman for the Saginaw-Bay City-Midland, Michigan cellular market, File No. 34763-CL-P-94-A-84, accepted by Public Notice, Report No. CL–355, released August 20, 1985; application of Crestview

that the return of the common Vallejo and Evansville applications was entirely correct, and the Joint Petitions for Reconsideration will be denied.

8. On the other hand, upon reconsideration of Vineyard Cellular's application, we find that its bank letter does evidence an independent demonstration of its financial qualifications. The letter identifies the applicant to whom the bank is giving assurance of the loan as Vineyard Cellular and shows that it is that applicant's own financial data which the bank has reviewed. Accordingly, we will grant reconsideration and reinstate Vineyard Cellular's Vallejo application.

### *B. Lakeland Applications*

9. Seventeen non-wireline applicants for the Lakeland-Winter Haven, Florida cellular market filed a Joint Petition for Reconsideration of the return of their applications as unacceptable for filing.[9] Each of the seventeen Lakeland applications stated:

> The Applicant has entered into a prefiling agreement, whereby, upon acceptance for filing of its application, it will seek dismissal of its application, contingent upon FCC approval of the Applicant receiving an attributable interest in another cellular application in this market. The details will be included when the Applicants seek Commission approval of the merger.

It was determined that this statement failed to supply adequate information regarding ownership, as required by Section 22.13(a)(1). Each of the applications also contained identical letters from NCNB National Bank addressed to "Dear Applicant". It was determined that a bank letter addressed "Dear Applicant" did not identify the individual applicant receiving the commitment and, thus, did not contain an essential element of the terms of the credit arrangement. It was further determined that such a bank letter failed to demonstrate each applicant's independent financial qualifications. Accordingly, the applications were returned as unacceptable for filing for (1) failure to supply adequate ownership

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Partnership for the Little Rock-North Little Rock, Arkansas cellular market, File No. 35000-CL-P-92-A-84, accepted by Public Notice, Report No. CL-356, released August 20, 1985; and application of Carter Partnership for the Jackson, Mississippi cellular market, File No. 34936-CL-P-106-A-84, accepted by Public Notice, Report No. CL-359, released August 22, 1985. The acceptance of these and other applications which were involved in pre-filing settlement agreements refutes the argument made by the applicants here that we have engaged in some type of *ex post facto* action to amend our rules to proscribe pre-filing agreements in Round IV.

[9] The involved Lakeland applications are listed in the Attachment by file numbers containing market designation number 114.

information (i.e. partners to pre-filing agreement or nature of interest in surviving application) pursuant to Section 22.13(a)(1) of the Commission's Rules and (2) failure to proffer a bank letter that contained information required by Rule 22.917(e)(1); and, thus, to demonstrate availability of funding for construction and operation of the system for one year pursuant to Rule 22.917(a).

10. In their Joint Petition, the involved applicants assert that they have complied with the Commission's *Cellular Lottery Rulemaking, supra*, at footnote 73 and *Public Notice*, Report No. CL–75, *supra*, by disclosing the existence of the pre-filing settlement agreements to which they were parties. They assert that the Commission's guidelines do not require information other than notification of the existence of such an agreement. With regard to the Division's second reason, the applicants assert that the bank letter in each of their applications contains the terms required by Section 22.917(e)(1) and therefore they have demonstrated the required availability of funding. The Lakeland applicants submit that the bank letters in their respective applications were accepted and signed individually by each applicant.

11. Initially, we agree with the petitioners that the cited ownership information defect was in error. At the time for filing Round IV applications, the Commission's rules and Public Notices required only that applicants are "under a duty to disclose in their applications the existence of any pre-filing agreements." *Public Notice*, CL–75, *supra*. Since the petitioners did disclose the existence of their pre-filing agreement, we conclude that the cited ownership information defect was in error, and we will grant reconsideration and eliminate such cited defect.

12. After reconsidering the financial qualifications issue raised by the applicants, we also find that the bank letter each has proffered satisfies the Commission's application requirements for Round IV cellular filings. The Division's initial determination was based on a finding that the letter, addressed to "Dear Applicant," did not appear to identify the individual applicant receiving the bank's assurance and thus did not contain an essential element of the terms of the credit arrangement, as well as indicating a lack of independent financial qualifications. However, we find that the Division did not give sufficient weight to the fact that each bank letter contained an individual signature and acceptance by each of the Lakeland applicants at the end of the letter. Thus, we do not believe that any essential terms are missing or that these applicants have failed to demonstrate their independent financial

qualifications. Accordingly, we will grant reconsideration and reinstate the Lakeland applications.

## *ORDERING PARAGRAPHS*

13. Accordingly, IT IS ORDERED, That the Joint Petitions for Reconsideration filed by the applicants in the Vallejo and Evansville cellular service markets ARE DENIED.

14. IT IS FURTHER ORDERED, That the Petition for Reconsideration filed by Vineyard Cellular Communications IS GRANTED and its application IS REINSTATED and accepted for filing.

15. IT IS FURTHER ORDERED, That the Joint Petition for Reconsideration filed by the applicants in the Lakeland-Winterhaven cellular service market IS GRANTED and their applications ARE REINSTATED and accepted for filing.

16. A copy of this order will be mailed to the Attorney of Record or to the Contact Representative designated in each of the involved Petitions for Reconsideration.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

## *Attachment*

### APPLICATIONS ASSOCIATED WITH THIS ORDER

| | |
|---|---|
| 1. Matz & Associates Partnership | File No. 30933-CL-P-111-A-84 |
| 2. Karatz Partnership | File No. 30934-CL-P-111-A-84 |
| 3. The Kessler Partnership | File No. 30936-CL-P-111-A-84 |
| 4. The Gordon Partnership | File No. 30937-CL-P-111-A-84 |
| 5. Brice Draper | File No. 30943-CL-P-111-A-84 |
| 6. The Phillippi Partnership | File No. 30944-CL-P-111-A-84 |
| 7. William N. Soiffer | File No. 32805-CL-P-111-A-84 |
| 8. The Gegurich Partnership | File No. 32807-CL-P-111-A-84 |
| 9. The Spencer Partnership | File No. 32808-CL-P-111-A-84 |
| 10. Allen Trachtenberg | File No. 32825-CL-P-111-A-84 |
| 11. Lee Partnership | File No. 32826-CL-P-111-A-84 |
| 12. Daniel Hoffman | File No. 32827-CL-P-111-A-84 |
| 13. The Seyfert Partnership | File No. 32828-CL-P-111-A-84 |
| 14. The Mangrum Partnership | File No. 32829-CL-P-111-A-84 |
| 15. The Watts Partnership | File No. 32830-CL-P-111-A-84 |
| 16. The Thorne Partnership | File No. 32831-CL-P-111-A-84 |
| 17. Donald A. Shafarman | File No. 32832-CL-P-111-A-84 |
| 18. The Burns Partnership | File No. 32833-CL-P-111-A-84 |
| 19. Vineyard Cellular Communications | File No. 34439-CL-P-111-A-84 |
| 20. The Hill Partnership | File No. 34474-CL-P-111-A-84 |

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| 21. The Sher Partnership | File No. 34475-CL-P-111-A-84 |
| 22. Terryll R. Smith | File No. 34476-CL-P-111-A-84 |
| 23. The Baer Partnership | File No. 34477-CL-P-111-A-84 |
| 24. Charles de Limur | File No. 34478-CL-P-111-A-84 |
| 25. Michael P. Whelan | File No. 34761-CL-P-111-A-84 |
| 26. Harold Wake | File No. 34762-CL-P-111-A-84 |
| 27. John G. Wood | File No. 33666-CL-P-114-A-84 |
| 28. Thomas Kennedy | File No. 33667-CL-P-114-A-84 |
| 29. R. Gary Price | File No. 33668-CL-P-114-A-84 |
| 30. Howard M. Beckert | File No. 33669-CL-P-114-A-84 |
| 31. Ella P.Wood | File No. 33672-CL-P-114-A-84 |
| 32. Zelda S. Neal | File No. 33673-CL-P-114-A-84 |
| 33. Sharkey A. Baz | File No. 33674-CL-P-114-A-84 |
| 34. James P. Vogt | File No. 33675-CL-P-114-A-84 |
| 35. John T. Carlton | File No. 33676-CL-P-114-A-84 |
| 36. Douglas M. Baz | File No. 33677-CL-P-114-A-84 |
| 37. Harvey B. Snively, Jr. | File No. 33678-CL-P-114-A-84 |
| 38. Corey A. Steadman | File No. 33679-CL-P-114-A-84 |
| 39. Kenneth W. Smith | File No. 34517-CL-P-114-A-84 |
| 40. Everett R. Whitehead | File No. 34519-CL-P-114-A-84 |
| 41. Robert C. Reiter | File No. 34520-CL-P-114-A-84 |
| 42. Mary R. Badcock | File No. 34527-CL-P-114-A-84 |
| 43. A. L. Campbell, Jr. | File No. 34528-CL-P-114-A-84 |
| 44. The Spencer Partnership | File No. 32809-CL-P-119-A-84 |
| 45. Donald Shafarman | File No. 32810-CL-P-119-A-84 |
| 46. Terryll R. Smith | File No. 32811-CL-P-119-A-84 |
| 47. The Thorne Partnership | File No. 32812-CL-P-119-A-84 |
| 48. The Baer Partnership | File No. 32813-CL-P-119-A-84 |
| 49. The Gordon Partnership | File No. 32814-CL-P-119-A-84 |
| 50. The Gregurich Partnership | File No. 32815-CL-P-119-A-84 |
| 51. Matz & Associates Partnership | File No. 32816-CL-P-119-A-84 |
| 52. Brice Draper | File No. 32817-CL-P-119-A-84 |
| 53. The Mangrum Partnership | File No. 32818-CL-P-119-A-84 |
| 54. Charles de Limur | File No. 32819-CL-P-119-A-84 |
| 55. The Burns Partnership | File No. 32820-CL-P-119-A-84 |
| 56. Michael P. Whelan | File No. 32821-CL-P-119-A-84 |
| 57. The Watts Partnership | File No. 32822-CL-P-119-A-84 |
| 58. The Kessler Partnership | File No. 32823-CL-P-119-A-84 |
| 59. The Phillippi Partnership | File No. 32824-CL-P-119-A-84 |
| 60. The Sher Partnership | File No. 34289-CL-P-119-A-84 |
| 61. The Hill Partnership | File No. 34290-CL-P-119-A-84 |
| 62. The Seyfert Partnership | File No. 34291-CL-P-119-A-84 |
| 63. Karatz Partnership | File No. 34292-CL-P-119-A-84 |
| 64. Harold Wake | File No. 34293-CL-P-119-A-84 |
| 65. William N. Soiffer | File No. 34294-CL-P-119-A-84 |
| 66. Allen Trachtenberg | File No. 34295-CL-P-119-A-84 |
| 67. Lee Partnership | File No. 34296-CL-P-119-A-84 |
| 68. Daniel Hoffman | File No. 34297-CL-P-119-A-84 |

END

**Anticompetitive Practice**
**Cross Interest**
**Newspaper Ownership**

> **Newspaper's first-place listing of programs of its commonly owned TV station held not to constitute a cross-ownership abuse where other stations otherwise treated equally; egregious cases may still warrant review.**
> **— *WDAY, Inc.***

FCC 86-51

## BEFORE THE

# FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

| | |
|---|---|
| In re Applications of | |
| WDAY, INC. (WDAY-TV) Fargo, North Dakota | File No. BRCT-821122YN |
| For Renewal of License | |
| WDAY, INC. (KMBY(TV)) Bismarck, North Dakota | File No. BPCT-830620KJ |
| WDAY, INC. (KMCY(TV)) Minot, North Dakota | File No. BPCT-830620KL |
| For Television Construction Permits | |

## ORDER

Adopted: January 21, 1986; Released: January 24, 1986

BY THE COMMISSION:

1. The Commission has before it for consideration: (a) the above-captioned applications of WDAY, Inc. (WDAY) for renewal of the license of Station WDAY-TV, Channel 6, Fargo, North Dakota, and for construction permits for new satellites of that station — Station KBMY(TV), Channel 17 in Bismarck, North Dakota, and Station KMCY(TV), Channel 14 in Minot, North

Dakota; (b) the September 28, 1984, action of the Chief, Mass Media Bureau, granting all three applications (*WDAY, Inc.*, Mimeo No. 29 (MMB, released October 4, 1984)); (c) an application for review of that action, filed November 5, 1984, by Spokane Television, Inc. (Spokane TV), licensee of Station KTHI in Fargo; and (d) related pleadings.[1]

2. WDAY, Inc. (WDAY), which is controlled by the Forum Publishing Company (Forum), is the licensee of Stations WDAY-AM-FM-TV in Fargo and of satellite Station WDAZ-TV in Devils Lake, North Dakota. Forum also controls VHF television stations in Sioux Falls, Aberdeen, and Pierre, South Dakota, an AM radio station in Grand Island, Nebraska, and daily newspapers in Fargo (*The Forum*) and in Willmar, Minnesota. In this proceeding, WDAY not only seeks renewal of its license for WDAY-TV, but it also seeks two new stations in Minot and Bismarck, each to be operated primarily as a satellite of Station WDAY-TV. Initially, petitions to deny the applications were filed by Spokane TV and jointly by KXMC-TV, Inc. and Bismarck TV, Inc., licensees of Stations KXMC-TV in Minot and KXMB-TV in Bismarck.[2] The petitioners alleged generally that Forum, through its newspaper and broadcast stations, dominates the mass communications media in North and South Dakota contrary to the public interest.[3] In that respect, Spokane TV alleged several specific abuses arising from Forum's broadcast/newspaper cross-ownership in Fargo that warranted compulsory divestiture of WDAY-TV and denial of the satellite applications. In addition, the petitioners argued that both Bismarck and Minot already have full-service stations licensed to them and that grant of the satellite applications would not only create a competitive imbalance in those communities, but would also exacerbate Forum's

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[1] On March 7, 1985, Spokane TV filed a Supplement to its Application for Review, in which it contends that WDAY failed to submit a copy of an antitrust suit filed against it by Midwest Radio Company, Inc., licensee of Stations KQWB and KQWB-FM in Moorhead, Minnesota, on January 10, 1985. Rather, it states, WDAY merely informed the Commission of that fact. Spokane TV, however, has not cited any Commission requirement to that effect. Neither the Commission's Rules nor the relevant application forms require the submission of an antitrust complaint filed against an applicant.

[2] Informal objections to the Bismarck and Minot applications were also filed by Meyer Broadcasting Company, licensee of Stations KFYR-TV in Bismarck and KMOT(TV) in Minot, but the objections were subsequently dismissed as moot.

[3] As to the petitioner's claim that Forum dominates the media in both North and South Dakota, we note the recent sale of the licensee's three South Dakota stations, (the Commission approved the sale on 11/15/85). Thus, to this extent, the petitioner's concerns regarding such alleged dominance are substantially lessened.

concentration of control of the media in North Dakota. The Bureau found that Spokane TV and the joint petitioners had failed to raise substantial or material questions of fact warranting designation of any of the applications for hearing. The Bureau did, however, order corrective action with respect to *The Forum* newspaper's apparent preferential treatment of Station WDAY-TV in its television listings, but found that the abuse was not so egregious that a hearing was warranted. Consequently, the Bureau granted all three applications, whereupon Spokane TV filed the pending application for Commission review.

3. We have reviewed the action of the Chief, Mass Media Bureau, and we conclude that the matter was fairly considered and properly decided under applicable precedent. With regard to *The Forum's* method of carrying television listings, however, the Bureau based its conclusion on Commission policy set out in *KHQ, Inc.*, 50 R.R. 2d 21 (1981), and related cases, where newspapers' out-of-sequence listings of co-owned broadcast stations' programs have been considered to be abuses of cross-ownership. Subsequently, however, we issued a Policy Statement and Order by which we eliminated or modified various broadcast regulatory "underbrush" policies and rules that were no longer warranted or required by the public interest. *Elimination of Unnecessary Broadcast Regulation*, 57 R.R. 2d 913 (1985). Among the policies eliminated was one forbidding the use of a station for competitive advantage in other business activities. In doing so, we stated:

> [t]o the extent the [policy covers] areas regulated by the antitrust laws, other agencies such as the Department of Justice or the Federal Trade Commission have primary enforcement responsibility. To the extent [it covers] areas unprotected by other laws, we believe it inappropriate for this Commission to strike down practices not forbidden by the Congress unless there is substantial risk of serious harm to listeners. Where the practices do not amount to antitrust violations, we think they are unlikely to have serious harmful effect. Accordingly, we believe our retention and enforcement of [this policy] dealing with the "improper use of a station" [are] no longer necesssary. [*Ibid.* at p. 921.]

Although a newspaper's preferential treatment of a co-owned broadcast station is not the same thing as the use of a station for competitive advantage in other business activities, they are sufficiently similar in intent to warrant a relaxation of our policy set out in *KHQ, Inc.*, *supra*. Although *The Forum* has consistently printed WDAY-TV's programs first in the listings, the other local stations have otherwise been treated equally. Moreover, this does not appear to be the type of egregious situation that warrants our intrusion. Consequently, we reverse that portion of the Bureau's decision that found WDAY-TV's first-place listing to be an abuse necessitating corrective action.

4. Accordingly, IT IS ORDERED, That, pursuant to Section 1.115(g) of the Commission's Rules, Spokane TV's application for review IS DENIED and the Bureau's action IS REVERSED to the extent indicated above.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Alien Ownership
Citizenship Requirement

In a *Declaratory Ruling*, the Commission specified that limited partnership interests are ownership interests within the scope of the citizenship requirements embodied in Section 310(b)(3) and (4) of the Communications Act. In addition, the Commission clarified the manner in which it would apply the statutory benchmarks contained in Section 310(b)(3) and (4).
— Wilner & Scheiner

FCC 85-295

BEFORE THE

# FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

Request for Declaratory Ruling
Concerning the Citizenship Requirements
of Sections 310(b)(3) and (4) of the
Communications Act of 1934, as amended

## DECLARATORY RULING

Adopted: May 31, 1985; Released: June 25, 1985

BY THE COMMISSION:

1. Before the Commission is a "Petition for Declaratory Ruling" ("Petition") filed by Wilner & Scheiner on March 17, 1983,[1] requesting clarification[2] with respect to the scope of the citizenship requirements set forth in Section 310(b)(3) and (4) of the

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[1] "Petition for Declaratory Ruling," filed by Wilner & Scheiner (March 17, 1983) ["Petition"].

[2] The petitioner requests the Chief of the Mass Media Bureau, on delegated authority, to address the issues raised in the Petition. Section 0.283 of our rules provides that the Chief of the Mass Media Bureau shall refer to the Commission *en banc* requests for declaratory rulings in instances where such petitions, *inter alia*, "contain new or novel arguments not previously considered by the Commission. . . ." 47 C.F.R. § 0.283(b)(5) (1984). Because the Commission has never specifically addressed the applicability of Section 310(b) to alien limited partnership interests, the Chief of the Mass Media Bureau has referred this matter to the full Commission for disposition.

Communications Act of 1934, as amended.[3] Specifically, the petitioner urges us to "state whether aliens may hold limited partnership interests aggregating more than 20 percent of the ownership of a licensee or aggregating more than 25 percent of a partnership directly or indirectly controlling a corporate licensee."[4] It requests us both to issue the declaratory ruling and answer the inquiry it raises in the affirmative.

## *I. PETITION FOR DECLARATORY RULING*

2. The petitioner, a law firm which actively represents licensees and applicants for broadcast licenses, filed its request on behalf of "certain interested clients"[5] which are not further identified. In support of its contention that the issue it raises is an appropriate subject for a declaratory ruling, the petitioner argues that the scope of the statutory proscription is unsettled as a matter of law. In addition, the petitioner suggests that the issuance of a declaratory ruling definitively resolving this issue is particularly important "prior to the submission of potentially violative applications because of the potential for disqualification or revocation if such applications are presented as a *fait accompli*."[6]

3. While acknowledging that the citizenship requirements embodied in Section 310(b) apply to partnerships as well as to corporations, the petitioner contends that a limited partnership interest is distinguishable from either a corporate or general partnership interest because limited partners, unlike other principals, are unable to exercise control over business affairs. It argues that the interest of a limited partner is most closely analogous to that of a creditor and, like a creditor, its ownership interests should be disregarded when determining compliance with the citizenship requirements of Section 310 of the Communications Act. The petitioner also contends that Congress, in establishing the citizenship requirements, was only concerned with actual rather than potential alien control and that exclusion of limited partnership interest, therefore, is consistent with the underlying statutory objectives. Finally, the petitioner asserts that an exclusion of limited partnership interests from the scope of Section 310 is supported by both Commission precedent concerning limited partnerships[7] and Commission rulings permitting alien

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[3] 47 U.S.C. § 310(b)(3), (4) (1982).

[4] Petition, *supra* n.1 at 2.

[5] *Id.* at 1.

[6] *Id.* at 2.

[7] The two cases Wilner & Scheiner cite in support of this contention are *Anax*

officers in a licensee's parent corporation where the officers are uninvolved in the activities of the communications subsidiary.[8]

## *II. GRANT OF DECLARATORY RULING*

4. We agree with the petitioner that it is appropriate for us, in a declaratory ruling, to address the applicability of the citizenship requirements established in Section 310 of the Communications Act to companies in which aliens hold limited partnership interests.[9] A number of broadcast licensees and companies which directly or indirectly control broadcast licensees conduct business in the form of limited partnerships.[10] We believe, therefore, that the scope of the statutory requirements, as applied to limited partnership interests, is a matter of general interest warranting clarification by means of a Commission ruling. Furthermore, in light of absolute obligation of licensees to comply with the statutory citizenship requirements, the alien ownership proscription is an issue where Commission guidance is particularly appropriate. Additionally, we recognize that persons arguably within the scope of the alien ownership proscription would typically be reluctant to present this issue other than in the context of a declaratory ruling.[11]

## *III. RELEVANCE OF SECTION 310(b) TO LIMITED PARTNERSHIP INTERESTS*

5. With respect to the substantive matters raised in the Petition, we conclude that limited partnership interests are in fact ownership interests within the scope of the citizenship requirements embodied in Section 310(b) of the Communications Act and

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*tion, yet an alien cannot lawfully own in excess of 20 percent of the stock of a licensee merely because he or she has limited liability. Similarly, the fact that a limited partner enjoys the benefits of limited liability lends no support for the proposition that the interest he or she holds is exempt from the restrictions embodied in Section 310.*

[8] *See, e.g., Request for a Declaratory Ruling Concerning Section 310(a)(5) of the Communications Act,* 67 FCC 2d 604 (1974).

[9] The Commission has authority to issue declaratory rulings if it determines, in its discretion, that such rulings are appropriate. *See* 5 U.S.C. § 554(e) (1982); 47 C.F.R. § 1.2 (1984).

[10] *See, e.g., Anax Broadcasting, Inc., supra* n.7. *Central Texas Broadcasting Co.,* 90 FCC 2d 583 (1982); *Merrimack Valley Broadcasting Inc.,* 92 FCC 2d 506 (1982); *Greater Wichita Telecasting, Inc.,* 90 FCC 2d 1046, *reconsideration denied,* 92 FCC 2d 780 (1982); *Wometco Enterprises, Inc.,* FCC 85-30 (released February 6, 1985), *appeal docketed sub nom. Traylor v. FCC,* No. 85-1099 (D.C. Cir. filed Feb. 15, 1985).

[11] *See, e.g., Request for a Declaratory Ruling Concerning Section 310(A)(5) of the Communications Act,* 23 FCC 2d 659 (1970).

that the exclusion for such interests requested by the petitioner is unwarranted as a matter of law and, to the extent that the Commission has discretion to apply the statutory benchmarks,[12] unwise as a matter of policy. Accordingly, we decline to accept the petitioner's construction of the statute.

6. We believe that the statutory language itself, its administrative interpretation, and the underlying legislative history demonstrate that limited partnership interests are within the scope of Section 310(b). While the language describing the applicability of Sections 310(b)(3) and (4) is couched in terms of "any corporation,"[13] the definitional language of the Communications Act provides that the statutory proscriptions extend beyond corporate entities. The definition of "corporation" contained in the Communications Act "includes any corporation, joint-stock company or association."[14] Since a limited partnership is one form of "association,"[15] the statutory language itself establishes that interests in these types of businesses are properly encompassed within the scope of Section 310(b).[16]

7. Consistent with this statutory language, the Commission has applied the strictures of Section 310(b) to a variety of noncorporate entities.[17] Indeed, we have stated that the scope of Section 310(b)(3) applies equally to "all business forms"[18] and

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[12] *See* para. 22, *infra*.

[13] 47 U.S.C. § 310(b)(3), (4) (1982).

[14] 47 U.S.C. § 153(j) (1982).

[15] Under the Revised Uniform Limited Partnership Act of 1976 ("RULPA"), a limited partnership is defined as a "partnership formed by 2 or more persons under the laws of this State and having one or more general partners and one or more limited partners." RULPA § 101(7) (1976). A partnership under the Uniform Partnership Act is defined as an "association of two or more persons to carry on as co-owners a business for profit." UNIFORM PARTNERSHIP ACT § 6(1914).

[16] Moreover, even assuming, *arguendo*, that a limited partnership is not an "association" within the meaning of Section 153(j), we would construe the use of the term "include" in the statutory definition to mean that the enumerated businesses are merely illustrative in nature and, as a consequence, the statutory restrictions may be applicable to other entities as well. *See Amendment of the Commission's Rules to Allow the Selection Among Competing Applications Using Random Selection or Lotteries Instead of Comparative Hearings*, 93 FCC 2d 952, 978 n.37 (1983), *reconsideration granted in part*, FCC 84-596 (released Dec. 4, 1984), 57 RR 2d 427 (1984).

[17] *See, e.g., Kansas City Broadcasting Co.*, 5 RR 1057 (1952) (members of a church); *Chicagoland TV Co.*, FCC 65R-89 (released March 15, 1965), 4 RR 2d 747, 752 (1965), *application for review denied*, FCC 65-367 (released May 5, 1965) (labor union).

[18] *Reexamination of the Commission's Rules and Policies Regarding the Attribution of Ownership Interests in Broadcast, Cable Television and Newspaper Entities*, 97 FCC 2d 997, 1009 (1984), *reconsideration granted in part*, FCC 85-252 (released June 24, 1985) ["*Attribution Order*"].

have expressly recognized that an overly restrictive administrative interpretation of the scope of the statute could provide the vehicle for the complete circumvention of the alien ownership restrictions:

> If mere difference in types of organizations is made the test of the requirement of [Section 310(b)(3)] concerning United States citizenship, it is obvious that an alien wishing to apply for a station could by manipulation of organizational entities accomplish this simply by forming an association rather than a corporation. We find in the language and in the history of [Section 310(b)(3)] no warrant for such circumvention of the United States citizenship provisions of the Communications Act.[19]

8. A further indication that Congress intended to include all types of companies, including limited partnerships, within the scope of the alien ownership provisions is found in the legislative history of the Communications Act. The current alien ownership provisions were derived from Section 12 of the Radio Act of 1927 which, by its express terms, broadly applied, *inter alia*, to "any company, corporation or association."[20] With several modifications unrelated to the types of business organizations encompassed within the scope of the statute,[21] the Senate Committee on Interstate Commerce, in reporting the bill which was to become the Communications Act of 1934, stated its intention to adopt the restrictions on alien ownership contained in Section 12.[22]

9. The fact that the language of Section 310(b)(3) prohibits aliens from owning or voting more than 20 percent of the "capital stock"[23] of a licensee does not suggest the conclusion that limited partnership interests are intended to be exempt from the alien ownership restrictions. While interests in limited partnerships and other types of associations are generally not held through capital stock, Congress clearly intended to include interests in these entities within the scope of Section 310(b). Thus we have

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[19] *Kansas City Broadcasting Co.*, 5 RR at 1094.

[20] Radio Act of 1927, § 12, *reprinted in* Pike and Fischer Radio Regulation, Current Service at ¶ 20.12.

[21] In its Report, the Senate Committee stated the Section 310(a)(4) [now Section 310(b)(3)] of the Communications Act made two revisions to Section 12 of the Radio Act of 1927; it adopted a 20 percent ownership benchmark and limited the scope of the voting benchmark to actual voting interests. In addition, the Senate Committee stated that the adoption of Section 310(a)(5) [now Section 310(b)(4)] of the Communications Act incorporated explicit restrictions on alien interests in companies which control licensees. *See* n.30, *infra.*

[22] S. Rep. No. 781, 73rd Cong. 2d Sess. 7 (1934). Further evidence of this intent is found in the language of the Report which expressly states that the alien ownership benchmarks apply to interests held in a "company," a term broader in scope than "corporation."

[23] 47 U.S.C. § 310(b)(3) (1982).

interpreted the term "capital stock," as it applies to noncorporate entities, to encompass the alternative means by which equity or voting interests are held in these businesses. For example, the ownership limits of Section 310(b) have been applied to the interests of policyholders in a mutual insurance company[24] as well as those of the members of a church[25] and a labor union.[26] Similarly, we conclude that the statutory benchmarks are applicable to the partners who hold equity or voting interests in a limited partnership.

10. While the petitioner itself expressly acknowledges that "the restrictions imposed by Section 310(b) are not limited to corporate licensees, but have long been accepted as applying with equal force to unincorporated associations and partnerships as well,"[27] it nonetheless argues that "the Commission should not consider the citizenship of limited partners in determining an applicant's or license's [sic] compliance with Sections 310(b)(3) and (4) of the Communications Act."[28] In support of this interpretation of Section 310(b), the petitioner contends that the primary concern of Congress, in adopting the alien ownership provisions, was to prevent actual alien control rather than the mere possibility of alien control. Asserting that a limited partner is incapable of exercising control over the partnership, it contends that an exclusion from the scope of the statute is consistent with the underlying legislative purpose.

11. We disagree. First, while the petitioner is correct in its assertion that one objective underlying the adoption of Section 310 is to preclude aliens from exercising actual control over broadcast facilities,[29] this was not the sole purpose underlying the enactment of Section 310(b).[30] Rather, Section 310(b) reflects the

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[24] *Farragut Television Corp.*, FCC 65R-25 (released Jan. 26, 1965), 4 RR 2d 350 (1965).

[25] *Kansas City Broadcasting Co.*, 5 RR at 1094.

[26] *Chicagoland TV Co.*, *supra* n.17.

[27] Petition at 3.

[28] *Id.* at 6.

[29] *See, e.g.*, *Data Transmission Co.*, 52 FCC 2d 439 (1975). *Noe v. FCC*, 260 F.2d 739, 741 (D.C. Cir. 1958), *rev'd on other grounds*, 329 U.S. 223 (1959).

[30] In support of its assertion that Congress' intent in enacting Section 310(b) was to guard against actual control rather than potential control of broadcast facilities by aliens, the petitioner quotes the 1934 Report of the Senate Committee on Interstate Commerce. Petition at 6. The relevant section of this Report is as follows:

> Section 310(a)(4) [now Section 310(b)(3)] modifies the present law [Radio Act of 1927] by (1) refusing a station license to a company more than one fifth whose capital stock is owned of record by aliens" and (2) by changing the words "may be voted by aliens" in the present law to "is voted by aliens."

broader purpose of "safeguard[ing] the United States from foreign influence"[31] in the field of broadcasting. The specific citizenship requirements governing positional, ownership and voting interests reflect a deliberate judgment on the part of Congess as to the limitations necessary to prevent undue alien influence in broadcasting.[32]

12. Second, even if the underlying intent of Congress was limited to the prevention of actual alien control of broadcast facilities, Congress did not empower the Commission under Section 310(b)(3) to waive the statutory standards by making an independent determination as to what level of alien participation in a broadcasting company constitutes such control.[33] As we have

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The purpose of this is to guard against alien control and not the mere possibility of alien control.

[31] *Kansas City Broadcasting Co.*, 5 RR at 1093. *See Request for Declaratory Ruling*, 67 FCC 2d at 605 (The alien ownership regulations "reflect security precautions designed to prevent the participation of aliens in domestic radio activities").

S. Rep. No. 781, 73rd Cong., 2d Sess. 7 (1934). In context, it is clear that this statement does not support a broad exemption for "non-controlling" alien ownership interests above the statutory benchmarks. To the contrary, the statement in the Report concerning actual control was made at the time that Congress specifically adopted the 20 percent ownership benchmark. The statement disclaiming an intent to address "the mere possibility of alien control" was not made in connection with the ownership benchmark, but relates instead to the modification in the voting benchmark. The language of the 1934 Senate Report, therefore, lends no support for the assertion that the Commission possesses authority to carve out an exception to Section 310(b)(3) for limited partnership interests which exceed 20 percent.

[32] As the Commission's staff has recently stated, "the provisions pertaining to alien interests are clearly intended to apply to many cases that do not constitute *de jure* or *de facto* control under section 310(d)." Letter from Chief, Mass Media Bureau, Federal Communications Commission to American Colonial Broadcasting Corp. and Television Broadcasting Corp. (Jan. 10, 1985) at 10 ["*American Colonial Broadcasting Corp.*"].

[33] In applying the alien ownership benchmarks contained in Section 310(b)(3), we have no authority to independently assess whether or not the grant of a license to a company in which an alien holds an ownership interest above 20 percent would result in undue influence or control. For example, in corporations in which a single person or entity owns more than 50 percent of the voting stock, we have determined, as a factual matter, that no other stockholder possesses an influential or controlling ownerhsip interest. *Attribution Order*, 97 FCC 2d at 1008-09. Yet in applying the strictures of Section 310(b), it would be clearly impermissible for us to grant a license to a corporation in which an alien owns more than 20 percent of the stock merely because we concluded that the existence of a "single majority stockholder" or some other factor negated the potential for control or influence by that alien. Conversely, absent indications of *de facto* control, our inquiry in cases where subbenchmark interests are at issue generally is restricted to a determination as to whether or not the ownership interests of the alien are within the limitations prescribed by Congress. *See, e.g., Capital Cities Communications, Inc.*, 47 FCC 2d 298 (1974); *Gross Broadcasting Co.*, FCC 65R-130 (released Apr. 9, 1965), 4 RR 2d 929 (1965).

stated, we have "no opportunity for discretion"[34] in the application of these statutory requirements. Given that limited partners have an ownership interest under Section 310(b) of the Act, once we determine that an alien limited partner's participation exceeds the statutory limitations, our inquiry under Section 310(b)(3) is at an end.

13. Third, we believe that even if Congress had granted us the authority to make such independent determinations, a blanket exclusion of all limited partnership interests, as a policy matter, would be inappropriate. We have recently had occasion to address the powers of limited partners in the context of revising our attribution rules[35] and we found that limited partners may have the capability to exercise substantial control over business affairs.[36]

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[34] *Kansas City Broadcasting*, 5 RR at 1094.

[35] *Reexamination of the Commission's Rules and Policies Regarding the Attribution of Ownership Interests in Broadcast, Cable Television and Newspaper Entities*, FCC 85-252 (released June 24, 1985) ["*Attribution Reconsideration Order*"].

[36] The two cases cited by the petitioner do not support a blanket exclusion of limited partnership interests from the scope of Section 310(b). Contrary to the petitioner's assertion, *Anax Broadcasting Inc.*, *supra* n.7, a transfer of control case, does not support the proposition that "the limited partnership structure by definition absolutely prevents the limited partners from exercising control over the partnership's activities." Petition at 5. In *Anax*, we narrowly concluded that "[p]ursuant to the limited partnership agreement, the limited partners have no authority to participate in the management of the applicant." *Id.* at 488. The petitioner mistakenly equates our determination in *Anax* that certain limited partners under the specific terms of a partnership agreement lack the capacity to control the business with the broad proposition that all limited partners by operation of law lack that capability.

*Minority Ownership Policy*, *supra* n.7, the proceeding in which the Commission extended its tax certificate and distress sales policies to limited partnerships in instances where the general partner is both a minority and possesses more than 20 percent interest in the broadcasting entity, is inapposite. In that decision, we specified that we would "continue to review [limited partnership] agreements to ensure that complete managerial control over the station's operations is reposed in the minority general partner(s)." *Id.* at 855. Our determination that continued scrutiny of individual limited partnership agreements is needed to assure that the general partner actually is in complete control of the business necessarily reflected the fact that the role of all limited partners are not purely passive in nature. Moreover, as reflected in the direct quotation from *Minority Ownership Policy* contained in the Petition, in that proceeding we characterized the interest of the limited partner as "akin to that of a corporate shareholder. . . ." Petition at 4, *quoting Minority Ownership Policy*, 92 FCC 2d at 854. The interests of alien stockholders are, of course, subject to the restrictions embodied in Section 310(b). Therefore, to the extent that *Minority Ownership Policy* is relevant to the issues in this proceeding, it affirmatively supports the inclusion of alien limited partnership interests within the scope of Section 310(b).

14. We also reject the petitioner's argument that we should provide an exclusion from the scope of Section 310(b) for holders of limited partnership interests because a comparable exclusion is accorded to holders of debt interests. The statutory guidelines contained in Section 310(b) are specifically couched in terms of equity ownership and voting benchmarks.[37] Unlike limited partners, creditors do not possess either an ownership or voting interest over the licensee and consequently the direct restrictions embodied in Section 310(b)[38] are not applicable to debt interests.[39]

## *IV. APPLICATION OF SECTION 310(b) TO LIMITED PARTNERSHIP INTERESTS*

15. For the reasons set forth above, we conclude that alien limited partnership interests above the statutory benchmarks are included within the scope of Section 310(b). While we necessarily must consider the appropriate means by which to implement the statutory benchmarks in specific factual contexts, we expect that the guidelines contained in this section will be generally instructive with respect to the construction of these statutory provisions. Because the authority of the Commission to create a regulatory exception to the citizenship requirements differs under Section 310(b)(3) and Section 310(b)(4), these two statutory subsections are discussed separately.

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[37] By its express terms, the statute provides limitations on the amount of capital stock which can be owned or voted by aliens. Because the statutory limitations are cast in the disjunctive, the non-voting stock owned by aliens is considered in evaluating compliance with the benchmarks established by Section 310(b). *See American Colonial Broadcasting Co., supra* n.32 at 5. *See also* J. Watkins, "Alien Ownership and the Communications Act," 33 Fed.Comm. L. J. 1, 37 n.142 (1981) ["Alien Ownership"].

[38] By this assertion, we do not imply that the Commission cannot consider debt financing in cases involving Section 310(b). To the contrary, the Commission has the discretion to consider a broad range of factors, including debt transactions, in evaluating whether to grant an exemption from a strict application of the statutory benchmarks contained in Section 310(b)(4) in a specific factual situation where such an exemption would further the public interest. *See Data Transmission Co., supra* n.29. *See also* "Alien Ownership," *supra* n.37 at 29.

[39] The petitioner also states that "like a creditor, a limited partner does not incur any liability nor take any risk beyond the specific amounts of funds contributed pursuant to the partnership agreement." Petition at 5. This statement, while accurate, does not support an exclusion of all limited partnership interests from the scope of Section 310 of the Communications Act. The liability of a corporate stockholder is limited to the amount of his or her capital contribution, yet an alien cannot lawfully own in excess of 20 percent of the stock of a licensee merely because he or she has limited liability. Similarly, the fact that a limited partner enjoys the benefits of limited liability lends no support for the proposition that the interest he or she holds is exempt from the restrictions embodied in Section 310.

### *A. Section 310(b)(3)*

16. By the express terms of Section 310(b)(3), Congress imposed an absolute obligation upon the Commission to refuse to grant a license where "more than one-fifth of the capital stock is owned of record or voted by aliens. . . ."[40] In applying this statutory provision the Commission, after assessing whether or not aliens possess more than twenty percent equity ownership or voting interest in a company, is required by law to refuse to grant or revoke a license to a company in which either of these statutory benchmarks is exceeded. As noted above,[41] the Commission has the obligation to strictly apply the statutory benchmarks contained in Section 310(b)(3). Because the 20 percent voting and ownership benchmarks contained in Section 310(b)(3) apply to limited partnership interests, it would be unlawful for a limited partnership to be a broadcast licensee if the voting interest or the equity contribution[42] of the alien limited partners, in the aggregate, exceeds 20 percent.[43]

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[40] 47 U.S.C. § 310(b)(3) (1982).

[41] *See* para. 12 and n.33, *supra.*

[42] For the purpose of applying the statutory benchmarks, we have determined to define ownership interests in a limited partnership in terms of the equity contributions of the limited partners. We are cognizant, however, that there may be other means, including partnership shares, by which such interests can be calculated. If we find, through implementation of the statutory benchmarks, that the definition of ownership adopted in this *Declaratory Ruling* is inappropriate, we will revisit this determination.

[43] In addition to voting and equity ownership, partnership interests may convey power to direct the management or operations of the company. For example, both a partner in a partnership without limited partners and a general partner in a limited partnership have the power to manage the affairs of the company and to bind the partnership. Therefore, these types of partnership interests convey powers comparable to those of an officer and director as well as to those of a stockholder. In adopting Section 310(b)(3), Congress intended that aliens be prohibited entirely from holding such high level management positions. As a consequence, we construe the provisions of Section 310(b)(3) and (4) relating to officers and directors to encompass these partnership interests.

The power of a limited partner to participate in the management and operations of the partnership depends, in large part, upon the terms of the limited partnership agreement. If a limited partnership interest in a particular business conveys powers comparable to those held by an officer or director of a corporation, the prohibitions of Section 310(b) relating to alien officers and directors extend to such interests. We recognize, however, that many limited partners do not possess this type of power. Although the licensee has the burden of proving that alien limited partners do not in fact substantially participate in the management or operations of the business, we will permit it flexibility in the manner in which it chooses to demonstrate this lack of participation. Moreover, we note that in the process of revising our attribution

17. For the purpose of applying the statutory benchmarks contained in Section 310(b)(3), the citizenship status of natural persons and organizations organized under the laws of another country[44] are readily ascertainable. Any ownership or voting interest held by an individual other than a United States citizen or by an entity organized under the laws of a foreign government is counted in the application of the statutory benchmarks.

18. In contrast, the application of the benchmarks contained in Section 310(b)(3)[45] to an entity which is not organized under the laws of a foreign government but in which aliens possess equity or voting interests may not be clearly defined. While the fact of domestic organization is necessary for citizenship status, by itself it is not sufficient to place an entity beyond the scope of the statutory limitations established in Section 310(b). A contrary rule would enable aliens, by creating or shifting their interests to domestically organized businesses, to easily circumvent the clear intent of Congress to limit the level of influence of or ownership by aliens in broadcast licensees.

19. As a consequence, in situations in which aliens hold corporate interests in a licensee through intervening domestically organized companies, we consider the ownership and voting interests held by aliens in those companies. We have found that the degree of influence over the licensee conveyed indirectly through minority stock ownership or voting rights in a company which, in turn, holds stock in a licensee is not as great as that conferred by the possession of the same amount of stock directly in the licensee.[46] In quantifying indirect and non-controlling corporate interests, therefore, a "multiplier" is utilized to account for this dimunition of interest.[47] We have not employed a "multiplier", however, in calculating interests held in corporations

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rules, we established certain guidelines designed to assure that limited partners who qualify for an exemption from attribution are effectively insulated from the management and operations of the partnership. *Attribution Reconsideration Order, supra* n.35. Because compliance with the attribution criteria effectively insulates a limited partner from participating in the control of the partnership, alien limited partners who conform to these criteria will not be subject to the restrictions governing alien officers or directors.

[44] *See* 47 U.S.C. § 310(b)(3) (1982).

[45] By its express language, the benchmarks established in Section 310(b)(4), rather than those contained in Section 310(b)(3), apply in situations in which an entity directly or indirectly controls the licensee. *Compare* 47 U.S.C. § 310(b)(3) (1982) *with* 47 U.S.C. § 310(b)(4) (1982). As a consequence, the standards contained in Section 310(b)(3) are applicable only in situations in which an entity holds a non-controlling equity or voting interest.

[46] *See Attribution Order*, 97 FCC 2d at 1018.

[47] *See American Colonial Broadcasting Co., supra* n.32 at 4.

in excess of 50 percent.[48] The reason that the use of a "multiplier" is inappropriate in computing majority corporate interests is that these interests convey actual control over the business which is unlikely to be significantly attenuated through intervening companies.

20. In calculating the benchmarks contained in Section 310(b)(3) as they apply to limited partnership interests held by aliens in domestically organized companies, we will distinguish between limited partnership interests in which aliens may possess the ability to participate in the control of the business and those in which aliens are effectively insulated from an active involvement in partnership affairs. Regardless of the percentage of equity interest held by aliens in the limited partnership,[49] alien limited partners can be prevented from the capability of participating in the control of the business by proper insulating mechanisms. Because such mechanisms can preclude alien limited partners from possessing actual control, we find that we can compute the amount of their interests in the same manner as we quantify minority stock interests. We will employ a "multiplier," therefore, in computing the interests held by aliens in a licensee through intervening domestically organized limited partnerships if the licensee can demonstrate that the alien is effectively insulated from active involvement in partnership affairs.[50] Because we are unable to presume that holders of uninsulated limited partnership interests lack the ability to participate in the control of the partnership, we will restrict the use of the "multiplier" to properly insulated limited partnership interests.[51]

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[48] As we have stated, the "multiplier approach is used to ascertain minority ownership interests involving parent and subsidiary corporations or an individual's minority ownership interests in corporations." *News International, PLC*, 97 FCC 2d 349, 366 (1984). *See generally Attribution Order*, 97 FCC 2d at 1018.

[49] Unlike the interest in a corporation, the percentage of equity ownership in a limited partnership is not necessarily an accurate reflection of the amount of influence or control conveyed by that interest. As a consequence, even a limited partner who possesses a large equity interest may be effectively insulated from actual control over the business.

[50] While the licensee has flexibility in the manner in which it chooses to demonstrate insulation, we determine that alien limited partners who conform to the criteria established on reconsideration in the attribution proceeding will be deemed to be effectively insulated for the purpose of applying the "multiplier" to indirect limited partnership interests held by aliens under Section 310(b)(3). *See* n.43, *supra. Attribution Reconsideration Order, supra* n.35.

[51] For example, assume that (1) Company A, a domestically organized limited partnership, holds 22 percent ownership interest in the licensee; (2) B, a natural person who is not a citizen of the United States, is a limited partner with a 25 percent ownership interest in Company A; and (3) all other direct or indirect

### *B. Section 310(b)(4)*

21. The benchmark limitations contained in Section 310(b)(4), *inter alia*, apply to ownership and voting interests in limited partnerships which, in turn, hold controlling interests in a licensee. For purposes of calculating the limited partnership interests of aliens in companies which control the licensee under the benchmarks established in Section 310(b)(4), we will apply the standards enunciated in the preceding section. Any limited partnership interest held by an individual who is not a citizen of the United States will be counted in computing the 25 pecent benchmark as will any such interest held by an entity organized under the laws of a foreign government. We will utilize a "multiplier" approach in calculating the interests of insulated alien limited partners in domestically organized companies which control the licensee but will not "multiply" the interests of any alien limited partners who are not adequately insulated.[52]

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interests in the licensee are held by United States citizens. If B's interest is adequately insulated, under the "multiplier" approach B would be attributed with 5.5 percent ownership interest in the licensee. If B is not insulated from active participation in the business, the multiplier would not be used and B would be attributed with 22 percent ownership interest in the licensee thereby violating the ownership benchmark established in Section 310(b)(3).

Where it is applicable, the "multiplier" is utilized in any link in the ownership chain to determine the amount of alien ownership or voting interests in the licensee. For example, assume that (1) Company A, a corporation organized under the laws of the State of Delaware, owns 45 percent of the stock of the licensee; (2) Company B, a limited partnership which is organized under the laws of the State of Maryland, is itself a limited partner with a 45 percent ownership interest in Company A; (3) C, a natural person who is not a citizen of the United States, is a limited partner with an ownership interest of 80 percent in Company B; and (4) all direct and indirect interests in the licensee, with the exception of the limited partnership interest held by C, are held by United States citizens. If C's interest is adequately insulated, C has a 16.2 percent interest in the licensee (45 percent x 45 percent x 80 percent). If C's interest is not adequately insulated, a multiplier is not used in calculating the limited partnership link and the 20.25 percent interest held by C in the licensee (45 percent x 45 percent) is in excess of the statutory benchmark.

[52] As noted above, the 25 percent voting and ownership benchmarks contained in Section 310(b)(4) are applicable to companies which directly or indirectly control the licensee. As an example in applying these benchmarks, assume that (1) Company A, a domestically organized corporation, controls 75 percent of the stock of the corporate licensee; (2) Company B, a domestically organized limited partnership, holds 27 percent stock in Company A; (3) C, a natural person who is not a United States citizen, is a limited partner with a 26 percent ownership interest in Company B; and (4) all direct and indirect equity or voting interests in the licensee and Company A, with the exception of the limited partnership interest owned by C, are held by United States citizens. If C's interest is adequately insulated, C possesses a 7.02 percent interest in Company A (27 percent x 26 percent) and, as a consequence, the licensee is in compliance with the alien ownership limitations contained in Section 310(b)(4).

22. There are several differences in the alien ownership provisions contained in Section 310(b)(3), which apply to non-controlling interests directly in the licensee, and those of Section 310(b)(4), which apply to companies which directly or indirectly control the licensee. The benchmark levels contained in Section 310(b)(4) permit greater alien participation than those in Section 310(b)(3).[53] Moreover, in contrast to the flat statutory proscriptions contained in Section 310(b)(3), the provisions of Section 310(b)(4) expressly provide the Commission with the discretion to refrain from strictly applying the statutory benchmarks. Specifically, the Commission has the statutory authority to evaluate whether or not, in a particular situation, it is in the public interest to permit a person to obtain or to hold a station license notwithstanding the fact that the alien interests in that station exceed the statutory benchmarks.[54] We will continue to make such public interest determinations on a case-by-case basis. As noted above, however, in the process of revising our attribution rules, we established criteria designed to distinguish between influential and non-influential limited partnership interests in determining which interests are cognizable under the media multiple ownership rules.[55] While the attribution criteria are not exhaustive or dispositive in the context of alien ownership,[56] we expect them to be instructive in making the ultimate public interest determinations under Section 310(b)(4) regarding the appropriateness of permitting alien limited partnership interests in excess of the statutory threshold.

## V. PROCEDURAL MATTERS AND DISPOSITION

23. This Declaratory Ruling has been analyzed with respect to

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If C's interest is not adequately insulated, a multiplier is not used and C's 27 percent interest in Company A exceeds the statutory benchmark.

[53] Section 310(b)(3), *inter alia*, prohibits aliens from possessing more than 20 percent ownership or voting interest in the licensee; in addition, it flatly prohibits any alien from being a director of the licensee. 47 U.S.C. § 310(b)(3) (1982). In contrast, under the benchmarks contained in Section 310(b)(4), aliens are permitted to hold 25 percent ownership or voting interests in a company which controls the licensee; moreover, Section 310(b)(4) does not proscribe aliens from becoming directors as long as at least 75 percent of the directors in a company which controls the licensee are United States citizens. 47 U.S.C. § 310(b)(4) (1982).

[54] 47 U.S.C. § 310(b)(4) (1982). *See, e.g., Data Transmission Co.*, 52 FCC 2d at 440; *GRC Cablevision Inc.*, 47 FCC 2d 467 (1974).

[55] *Attribution Reconsideration Order, supra* n. 35.

[56] We have recognized that the attribution standards and the alien ownership provisions differ in scope and effect. *Attrilbution Order, supra* n.18. Indeed, in revising the attribution standards, we specifically decline to adopt the 20 percent alien ownership benchmark contained in Section 310(b)(3). *Id.*

the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or record keeping, labeling, disclosure, or record retention requirements, and will not increase or decrease burden hours imposed on the public.

24. Accordingly, IT IS ORDERED, THAT the "Petition for Declaratory Ruling" filed by Wilner & Scheiner IS GRANTED to the extent described herein and IS OTHERWISE DENIED.

25. IT IS FURTHER ORDERED, THAT the Secretary SHALL CAUSE this *Declaratory Ruling* to be printed in the Federal Communications Commission Reports.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

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## *V. PROCEDURAL MATTERS AND DISPOSITION*

23. This Declaratory Ruling has been analyzed with respect to

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If C's interest is not adequately insulated, a multiplier is not used and C's 27 percent interest in Company A exceeds the statutory benchmark.

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